Neutral Citation Number: [2026] EWHC 983 (Ch)

Claim No: IL-2022-000013

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INTELLECTUAL PROPERTY LIST (ChD)

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

28th April 2026

Before :

MR JUSTICE EDWIN JOHNSON

- -

Between :

(1) NOEL REDDING ESTATE LTD

(2) MITCH MITCHELL ESTATE LTD **Claimants**

and

SONY MUSIC ENTERTAINMENT UK LIMITED **Defendant**

- -

Simon Malynicz KC and Phillip Johnson (instructed by Keystone Law LLP) for the Claimants

Robert Howe KC and Jaani Riordan (instructed by Simkins LLP) for the Defendant

9th, 10th, 11th, 12th, 16th, 17th, and 18th December 2025

- -

JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10.30am on Tuesday 28th April 2026 by circulation to the parties and their representatives by email and by release to the National Archives.

Mr Justice Edwin Johnson:

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General introduction

1. In September 1966 the band known as *"the Jimi Hendrix Experience"* (**"JHE"**) was formed between James *"Jimi"* Hendrix, on guitar and vocals, David Noel Redding, on bass, and John Graham *"Mitch"* Mitchell, on drums. On 11th October 1966 the members of JHE entered into a recording agreement with two music producers; Michael Jeffery and Bryan *"Chas"* Chandler (together **"the Producers"**).

2. Sadly, all three members of JHE are now dead. Mr Hendrix died on 18th September 1970, aged only 27. Mr Redding died on 11th May 2003. Mr Mitchell died on 12th November 2008. I will refer to Mr Hendrix as **"Jimi Hendrix"**, as it will be necessary to make reference to some other members of the Hendrix family in this judgment.

3. JHE began recording music on 23rd October 1966, following the signing of the recording agreement mentioned above (**"the Recording Agreement"**). JHE's first single, *"Hey Joe"*, was released on 16th December 1966. JHE went on to record three albums. The first of these albums, *"Are You Experienced"*, was released on 12th May 1967. The second album, *"Axis: Bold as Love"*, was released on 1st December 1967. The third album, *"Electric Ladyland"*, was released in the United Kingdom on 23rd October 1968.

4. This action is concerned with around 40 studio recordings of performances (**"the "Performances"**) which were given by the members of JHE between 1966 and 1968. I will refer to these recordings as **"the Recordings"**. The central questions in the action are (i) the ownership of the copyrights in the Recordings (**"the Copyrights"**), and (ii)

the ownership of the performers' property rights in relation to the participation of, respectively, Mr Redding and Mr Mitchell in the Performances (**"the PPRs"**).

5. The First Claimant, Noel Redding Estate Limited (formerly Spectacular Films Limited and later Firefly Entertainment Limited) is a company incorporated on 22 November 2007. The First Claimant is the successor in title to any interest in the Copyrights which Mr Redding had at the time of his death, in 2003. The First Claimant is also the successor in title to any interest in the PPRs which Mr Redding had at the time of his death or which his estate/heir acquired thereafter.

6. The Second Claimant, Mitch Mitchell Estate Limited, is a company incorporated on 18 January 2021. The Second Claimant is the successor in title to any interest in the Copyrights which Mr Mitchell had at the time of his death, in 2008. The Second Claimant is also the successor in title to any interest in the PPRs which Mr Mitchell had at the time of his death.

7. The Defendant, Sony Music Entertainment UK Limited, is a major record label. It claims to have the right to exploit the Recordings in the UK pursuant to a sub-licence granted by its parent company. There is no dispute that the Defendant has been commercially exploiting the Recordings in the United Kingdom for many years in various ways, resulting in copies of the Recordings being made, distributed, and made available to the public. The Defendant's case is that its rights to exploit the Recordings ultimately derive from agreements made by various parties; namely a company called Experience Hendrix L.L.C. (**"Experience"**), the predecessors in title of Experience, the Producers (both of whom are also now, sadly, deceased), Jimi Hendrix's estate and heirs, and Mr Redding and Mr Mitchell.

8. The Claimants' case is that they respectively hold two sets of rights. The first set of rights comprises the shares in the ownership of the Copyrights which the Claimants say were vested, respectively, in Mr Redding and Mr Mitchell, at the times of their deaths. The second set of rights comprises the PPRs which the Claimants say were vested, respectively, in Mr Redding (and his estate/heir) and in Mr Mitchell, by virtue of their participation in the Performances, at the times of their deaths and, in the case of Mr Redding, following his death. On the basis of the rights which they claim to own, the Claimants advance two claims in this action, arising from the commercial exploitation of the Recordings in the UK. In the first claim (**"the Copyright Claim"**), the Claimants seek to establish their alleged part-ownership of the Copyrights and, on the basis of that alleged part-ownership, say that the Defendant has infringed the Copyrights. In the second claim (**"the PPR Claim"**), the Claimants say that the Defendant has infringed the PPRs, which have devolved to each of them from, respectively, Mr Redding (and his estate/heir) and Mr Mitchell. The Claimants seek declaratory relief in respect of their claims to ownership of the Copyrights and the PPRs, and an account or inquiry as to what is said to be due to them if the alleged infringements, or any of them are established.

9. The Defendant denies both the Copyright Claim and the PPR Claim (together **"the Claims"**). The Defendant's case is that there were no rights in or in respect of the Copyrights vested in either Mr Redding or Mr Mitchell when they died, or that the Copyright Claim had been compromised. The Defendant's case is that it has a valid sub-licence in respect of the entirety of the Copyrights. In relation to the PPRs the Defendant says that it has the benefit of consents to the exploitation of the Performances which

preclude the PPR Claims, or that the same have been compromised. On these bases the Defendant denies any infringement.

10. By an order made at the case and costs management conference in this action, on 5th September 2024, Deputy Master Jefferis directed a split trial of the action, with liability to be tried first. The action came on before me for the trial of liability (**"the Trial"**), on 9th December 2025. The Trial concluded on 18th December 2025.

11. At the Trial the Claimants were represented by Simon Malynicz KC and Phillip Johnson, counsel. The Defendant was represented by Robert Howe KC and Jaani Riordan, counsel. I am grateful to all counsel for their assistance, by their written and oral submissions, in the Trial.

12. This is my reserved judgment on the Trial.

The conventions of this judgment

13. For reasons which I shall explain, I shall need to consider questions of the law of the State of New York in this judgment. Unless otherwise indicated, references to New York in this judgment mean the State of New York, as opposed to the City of New York.

14. The two principal statutes to which I will need to make reference in this judgment are the (now repealed) Copyright Act 1956 (**"the 1956 Act"**) and the Copyright, Designs and Patents Act 1988 (**"the 1988 Act"**). In relation to the PPR Claim the issues between the parties engage the transitional provisions in Section 180(3) of the 1988 Act, Regulations 27(2) and 31 of the Copyright and Related Rights Regulations 1996 (SI 1996/2967) (**"the 1996 Regulations"**) and Regulation 32(2) of the Copyright and Related Rights Regulations 2003 (SI 2003/2498) (**"the 2003 Regulations"**). I will use the collective expression **"the Transitional Provisions"** to refer to these transitional provisions.

15. There is a transcript of the Trial. Where it is necessary to quote from the transcript, I give the day of the Trial, pdf internal page number and line, in square brackets and bold print; so that **[T1/1/1-5]** refers to the transcript of the first day of the Trial, pdf internal page number 1, at lines 1-5.

16. Although I am using the expression JHE to refer to the band of which Mr Redding, Mr Mitchell and Jimi Hendrix were members, JHE is not an apt expression to refer generally to these three individuals. JHE only existed for a relatively short period of time. I will use the expression **"the Band Members"** to refer collectively to Mr Redding, Mr Mitchell and Jimi Hendrix. The Band Members are also referred to as *"the Artistes"* in the Recording Agreement, and I will also adopt this expression to refer to the Band Members, when engaged in specific discussion of the provisions of the Recording Agreement.

17. I have added italics to quotations in this judgment.

Narrative

18. I can summarise the facts which have given rise to the Claims reasonably shortly. In doing so I have drawn extensively on an Agreed Statement of Facts prepared by the parties for my use, which has proved most helpful in the preparation of this judgment.

19. As I have said, JHE was formed in late September 1966. The three members of JHE entered into the Recording Agreement on 11th October 1966, pursuant to which all the Recordings were made. The Recording Agreement was signed by each band member (Mr Redding, Mr Mitchell and Jimi Hendrix, defined, as I have said, as *"the Artistes"*), as well as the Producers (Mr Jeffery and Mr Chandler), who were defined in the Recording Agreement as *"the Producers"*.

20. The Recording Agreement was expressed to be governed by the laws of the United Kingdom which, as I understand the position, has been treated by the parties as an intended reference to the laws of England and Wales. The Recording Agreement provided that the Artistes should record for the Producers exclusively for a period of seven years (expiring on 11th October 1973), subject to a right to renew for a further five years on the same terms and conditions. The right of renewal was not exercised.

21. As I have said, JHE began recording music on 23rd October 1996; that is to say shortly after the Recording Agreement was signed. JHE's first single, *"Hey Joe"*, was released on 16th December 1966. JHE went on to record the three albums I have mentioned.

22. The first of these three albums, *"Are You Experienced"*, was released in the UK on 12th May 1967. The album was recorded between 23rd October 1966 and 4th April 1967 at three London studios (De Lane Studios, CBS Studios and Olympic Studios) The second album, *"Axis: Bold as Love"*, was released in the UK on 1st December 1967. This second album was recorded, prior to the release on 1st December 1967, at Olympic Studios in London. The third album, *"Electric Ladyland"*, was released in the USA on 16th October 1968, and in the UK on 23rd October 1968. This third album was recorded, prior to the release on 16th October 1968, partially in London and partially at Record Plant Studios in New York.

23. JHE existed only for a relatively short time. The band played its final show on 29th June 1969 at the Denver Pop Festival. Mr Redding left JHE the following day, and JHE disbanded on or around that date. Thereafter JHE ceased to perform or record.

24. Jimi Hendrix died on 18th September 1970, at which time he was a resident of New York. Following his death Mr Redding and Mr Mitchell brought proceedings in the New York courts, advancing claims arising from their performances on JHE recordings, in reliance upon an alleged oral agreement, reached between themselves and Jimi Hendrix. This alleged oral agreement related to how the profits of what was said to have been the partnership between the members of JHE would be shared between them. These proceedings in New York are important, in the context of the Releases and Discontinuances, and require some explanation.

25. Jimi Hendrix died intestate. Letters of administration in respect of the estate of Jimi Hendrix (**"the Hendrix Estate"**) were granted to Mr Henry W Steingarten on 25th September 1970. Subsequently Mr Steingarten was replaced as administrator by Mr Kenneth D Hagood, to whom letters of administration were granted on or around 15th February 1971. The chronology and precise procedural history are not entirely clear to me at this point but, as I understand the position, proceedings were commenced in the Surrogate's Court of New York in respect of the administration of the Hendrix Estate, under Index Number 5670/1970. In those proceedings (**"the Administration Proceedings"**), on 26 February 1971, Mr Steingarten submitted an initial accounting in

respect of the Hendrix Estate and, on the same day, filed with the Surrogate's Court, in the Administration Proceedings, a petition for a voluntary accounting in respect of the Hendrix Estate.

26. On 5th August 1971 lawyers acting for Mr Redding and Mr Mitchell wrote to Mr Hagood asserting that they were each entitled to one third of the gross income of the Hendrix Estate. On 31st August 1971 Mr Hagood filed a notice formally rejecting that claim. Nonetheless on 1st September 1971 lawyers acting for Mr Redding and Mr Mitchell filed an Affidavit in Opposition to the Petition for an advance distribution from the Estate, in which they asserted that they had "*substantial unliquidated claims against the Estate*". I will refer to the claim or claims commenced by Mr Redding and Mr Mitchell in the Administration Proceedings, pursuant to the objection to voluntary accounting, as **"the Accounting Claim"**. The Accounting Claim was brought against Mr Hagood in his capacity as the then present administrator of the Hendrix Estate.

27. On 14th March 1972 Mr Redding and Mr Mitchell commenced a separate set of proceedings in the Supreme Court of New York (Index Number 23589/71). These proceedings **("the Supreme Court Claim")** were brought against Mr Hagood, in his capacity as administrator of the Hendrix Estate, and against a company called Are You Experienced Limited (**"AYE"**). AYE was a New York company which, according to the relevant documentary evidence, had been set up to receive and distribute JHE royalty income via a joint bank account from which sums were paid, or were said to have been paid to the Band Members. In the Supreme Court Claim, Mr Redding and Mr Mitchell alleged that they were entitled to a share of *"sums of monies consisting primarily of recording royalties earned by virtue of the sale of recordings containing the performances of Mr Hendrix, Mr Mitchell and Mr Redding"*. They alleged breach of the oral agreement referred to in my previous paragraph. Mr Redding and Mr Mitchell repeated their demand for a *"true and accurate accounting in conformity with the aforementioned agreement"*, and brought further claims in quantum meruit for *"all monies received by defendants as a result of any contract, agreement, activity, direct or indirect, involving the services of plaintiffs"* in performing on phonograph recordings, and for breach of contract.

28. I will use the collective expression **"the Historical New York Claims"** to refer to the Accounting Claim and the Supreme Court Claim.

29. The Historical New York Claims were the subject of settlements reached, individually, with Mr Redding and Mr Mitchell.

30. On 22nd April 1973 Mr Redding executed an agreement in writing entitled *"Release, Assignment and Covenant Not to Sue"*. By this agreement (**"the Redding Release"**) Mr Redding granted various forms of release to the Hendrix Estate, made certain assignments to the Hendrix Estate, and entered into various covenants not to sue with the Hendrix Estate. The Redding Release was also signed by Mr Shapiro, attorney for Mr Redding in the Historical New York Claims, recording his approval of the terms of the Redding Release.

31. This was followed by the filing of a document with the Supreme Court of New York in the Supreme Court Claim. The document is dated 9th May 1973 and identified Mr Mitchell and Mr Redding as the plaintiffs. The defendants were identified as Mr Hagood

in his capacity as administrator of the Hendrix Estate, *"et al"* (and others), which I take to be a reference to AYE, the other defendant to the Supreme Court Claim. The document recorded the following discontinuance:

> *"IT IS HEREBY STIPULATED AND AGREED, by and between COVINGTON, HOWARD, HAGOOD & HOLLAND, ESQS, as attorneys for the Defendant and JEROME B. FLEISCHMAN, ESQ. Attorney for the Plaintiff NOEL REDDING, parties to the above entitled action, that whereas no party to this Stipulation is an infant or incompetent person for whom a Committee has been appointed and no person not a party to this Stipulation has an interest in the subject matter thereof, the above entitled action, be and the same hereby is discontinued, insofar as it alleges causes of action on behalf of said NOEL REDDING, without costs to either party hereto as against the other. The causes of action alleged on behalf of the said NOEL REDDING are discontinued with prejudice. This Stipulation may be filed without further notice with the Clerk of the Court."*

32. The copy of this document (**"the Redding Discontinuance"**) which I have seen was signed by Mr Redding's attorney and the attorneys for the defendants.

33. On 30th September 1974 Mr Mitchell executed an agreement in writing, also entitled *"Release, Assignment and Covenant Not to Sue"*. By this agreement (**"the Mitchell Release"**) Mr Mitchell granted various forms of release to the Hendrix Estate, made certain assignments to the Hendrix Estate, and entered into various covenants not to sue with the Hendrix Estate. The Mitchell Release was also signed by the firm of attorneys acting for Mr Mitchell in the Historical New York Claims, recording their approval of the terms of the Mitchell Release.

34. This was followed by the filing of a document with the Supreme Court of New York in the Supreme Court Claim. The document is dated 1st October 1974 and identified Mr Mitchell and Mr Redding as the plaintiffs. The defendants were identified as Mr Hagood in his capacity as administrator of the Hendrix Estate, and AYE. The document recorded the following discontinuance:

> *"IT IS HEREBY STIPULATED that:*
>
> 1. *The appeal of John Graham Mitchell from an order of the Supreme Court, New York County, dated July 16, 1974, which appeal now is pending before the Appellate Division of the New York State Supreme Court, First Department, be and hereby is withdrawn with prejudice and without costs to either party: and*
> 2. *Whereas neither plaintiff John Graham Mitchell nor defendants are infants or incompetents, the above-captioned action be and hereby is discontinued as between said plaintiff and defendants, with prejudice, and without further costs to either party as against the other."*

35. The copy of this document (**"the Mitchell Discontinuance"**) which I have seen was signed by Mr Mitchell's attorney and the attorneys for the defendants.

36. I will use the collective expression **"the Releases"**, to refer to the Redding Release and the Mitchell Release. I will use the collective expression **"the Discontinuances"**, to refer to the Redding Discontinuance and the Mitchell Discontinuance.

37. The sole beneficiary of the Hendrix Estate was Jimi Hendrix's father, Mr James A *"Al"* Hendrix. On 30th March 1977 Mr Hagood distributed to Al Hendrix all right, title and interest in the assets of the Hendrix Estate.

38. On 23rd January 1973 Mr Alan Leighton-Davis was appointed as administrator of the English estate of Jimi Hendrix, pursuant to letters of administration granted out of the Principal Probate Registry in reliance upon a power of attorney granted by Mr Hagood for that purpose.

39. Mr Redding died on 11th May 2003. By his will he left his estate to his partner, Deborah McNaughton. Deborah McNaughton died on 17th May 2005 and, by her will, left her estate to her two sisters, Alexis and Nancy McNaughton. The First Claimant is the successor in title, through the McNaughton sisters, to any interest which Mr Redding had in the Recordings and Performances when he died, and (which is a relevant point in relation to Mr Redding) to any interest or right acquired by his personal representative or Ms Deborah McNaughton, following his death.

40. Mr Mitchell died intestate on 12th November 2008. His estate passed to his daughter, Aysha Mitchell. The Second Claimant is the successor in title, by Ms Mitchell, to any interest which Mr Mitchell had in the Recordings and the Performances when he died.

41. Turning to the Producers they are also both dead. Mr Jeffery died in a plane crash on 5th March 1973. Mr Chandler died on 17th July 1996.

42. As I have explained, the Defendant, Sony Music Entertainment UK Limited, is a major record label. It claims to have the right to exploit the Recordings in the UK pursuant to a sub-licence granted by its parent company. There is no dispute that the Defendant has been commercially exploiting the Recordings in the UK for many years in various ways, resulting in copies of the Recordings being made, distributed, and made available to the public. The Defendant is the UK sub-licensee and distributor for its parent company, Sony Music Entertainment (**"SME"**), which is partnership incorporated under the laws of the State of Delaware. SME is the licensee of Experience (Experience Hendrix L.L.C.) and its subsidiary, Authentic Hendrix LLC (**"Authentic"**). Experience and Authentic are companies incorporated under the laws of the State of Washington. The licence is recorded in an agreement made on 19th August 2009 between SME and Experience. The term of this agreement originally ran from 1st January 2010 to 31st December 2017, but has since been twice extended, and now runs to 5th January 2031.

43. The Defendant's case is that Experience is the ultimate successor to (i) the rights of the Producers under the Recording Agreement, via a series of transactions, and (ii) to whatever rights vested in the Hendrix Estate pursuant to the Releases and the Discontinuances, via Al Hendrix. The Defendant's case is that by virtue of these transactions Experience held the rights to exploit the Recordings, including the Copyrights and the PPRs claimed by the Claimants. As such, the Defendant says, Experience was able to license these rights to SME and, in turn, SME was able to sub-license the rights to the Defendant.

44. No claim was brought against Experience by Mr Redding or Mr Mitchell in their lifetimes. There was some limited communication with Mr Redding, as follows.

45. In September 1996, Mr Redding telephoned Candace Caroll, a representative of Experience, claiming to be entitled to a share of royalties on the Recordings. The response to this telephone call came in the form of a letter to Mr Redding dated 18th September 1996 from Mr H. Reed Wasson, General Counsel of Experience. In that letter Mr Wasson asserted that, by the Redding Release, Mr Redding had promised, amongst other matters, forever to refrain from making any future claim for royalties. As I understand the position, there was no response to this letter, and the correspondence went no further.

46. On 16 April 2003, Smith Dornan & Shea PC, a firm of New York lawyers acting for Mr Redding, wrote to Janie Hendrix, sister of Jimi Hendrix. The letter was sent to Janie Hendrix in her capacity as representative of Experience, on the basis that Experience was the successor to the estate of Jimi Hendrix. By his lawyers Mr Redding claimed that the Redding Release did not, for various reasons, cover all of the subsequent exploitation of the Recordings, and that Mr Redding was entitled to a 25% share of Experience's income from its exploitation of the Recordings. A further letter was sent in September 2003, following Mr Redding's death in May 2003. A draft complaint, as would have been required for the purpose of commencing proceedings in New York, was sent by Mr Redding's lawyers in late November 2003, but no proceedings were commenced.

47. There was no further communication in relation to the exploitation of the Recordings until 8th December 2021, when the Claimants' solicitors (Keystone Law LLP) sent a letter of claim on behalf of the Claimants to the Defendant. This action was commenced by Claim Form issued on 4th February 2022.

48. This was the first communication from Mr Redding (or anyone connected with him or his estate) since 2003 in relation to Experience's exploitation of the Recordings or the Performances. It was also the first time that Mr Mitchell (or anyone connected with him or his estate) had raised an objection in relation to Experience's exploitation of the Recordings or the Performances. The Claim Form was, as I have said, issued on 4th February 2022 and the Particulars of Claim were served on 18th February 2022.

49. In response to the letter of claim Experience and Authentic (together **"the Hendrix Companies"**) and SME commenced proceedings in New York against the Claimants, seeking declaratory relief. The New York proceedings were commenced on 18th January 2022. This resulted in a jurisdictional battle. On 22nd February 2022, the Claimants filed a motion in New York to dismiss the New York proceedings on jurisdictional grounds. On 16th March 2022 the Defendant issued an application in this action, challenging the jurisdiction of the courts of England and Wales to hear this action. It is not necessary to go into the history of these battles. The upshot was that the application in this action was dismissed by Deputy Master Rhys on 21st June 2022. The Defendant appealed against that dismissal. The appeal came before me. For the reasons set out in a judgment which I handed down on 25th April 2023, I dismissed the appeal. So far as the New York proceedings were concerned they were stayed, pending the outcome of this action, by an order made by Abrams J on 16th May 2023.

50. So far as the procedural chronology is concerned, there is one other application which requires specific mention. The Defendant applied to strike out the claims in the action on a number of grounds. The strike out application came before Michael Green J. For the reasons set out in a judgment handed down on 29th January 2024, Michael Green J

struck out certain paragraphs of the Particulars of Claim. Certain claims were withdrawn by the Claimants. The key outcome was however that the Claims (the Copyright Claim and the PPR Claim) were allowed to proceed to trial; see *Noel Redding Estate Limited v Sony Music Entertainment UK Limited* [2024] EWHC 128 (Ch).

51. The Defendant appealed against the partial refusal of the strike out application. The Defendant appealed on two grounds. The first ground was that the judge had been wrong to reject the Defendant's contention that the PPR Claim was precluded by the Transitional Provisions. The second ground was that the judge had been wrong to reject the Defendant's contention that the Copyright Claim was statute barred, as being a claim in respect of partnership assets.

52. Judgment on the appeal was handed down on 6th February 2025. For the reasons set out in a judgment of Arnold LJ, with which Newey and Birss LJJ agreed, the Court of Appeal dismissed the appeal. Judgment was handed down on 6th February 2025; see *Noel Redding Estate Limited v Sony Music Entertainment UK Limited* [2025] EWCA Civ 66. The relevance of the judgment of Arnold LJ, for the purposes of the Trial, is that it is the Claimants' case that the Court of Appeal have, by this judgment, already decided certain issues in relation to the Defendant's case based upon the Transitional Provisions, as mentioned above. This is a matter to which I shall return, later in this judgment, when I come to consider the issues relating to the Transitional Provisions.

The issues

53. In the course of the Trial, counsel produced an agreed updated list of the issues which I have to decide. By reference to that document, the issues which I have to decide are as follows:

The Copyright Claim

(1) Who were the first owners of the Copyrights? Were the first owners Mr Redding, Mr Mitchell and Jimi Hendrix, as the members of JHE, or the Producers?

(2) If it is assumed that Mr Redding and Mr Mitchell were part-owners (with Jimi Hendrix) of the Copyrights, as first owners, are the Claimants nevertheless precluded from bringing any claims in respect of the Copyrights against the Defendant by the Releases and/or the Discontinuances.

The PPR Claim

(3) What were the meaning and effect of the Recording Agreement? In particular:

  (i) What were the scope and duration of the consents granted to the Producers by Mr Redding and Mr Mitchell to fixation, commercial release, and exploitation of the Performances?

  (ii) Did the consents meet the required standard of consent (if any) and was the benefit of those consents able to be transferred?

  (iii) Is Experience the successor to the benefit of the consents which were given in clause 6(ii) and (iii) of the Recording Agreement, by reason of the transactions referred to in Schedule 2 of the Amended Defence?

  (iv) Are the PPR Claims precluded by reason of the said consents being arrangements and/or agreements within the meaning of the Transitional Provisions and, if so, were the Defendant's acts which are complained of done pursuant to those arrangements and/or agreements?

  (v) Are the PPR Claims in relation to the rights conferred under the 1996 Regulations (meaning Sections 182A, 182B and 182C of the 1988 Act) precluded by reason of those rights being vested in the Producers (or their

successors under the Recording Agreement), pursuant to Regulation 31 of the 1996 Regulations?

(4) What were the meaning and effect of the Releases. In particular:
   (i) What were the meaning and effect of the Redding Release under New York law?
   (ii) What were the meaning and effect of the Mitchell Release under New York law?
   (iii) Is Experience the successor to the benefit of the Releases, by reason of the agreements referred to in Schedule 1 of the Amended Defence?

(5) What were the meaning and effect of the Redding Discontinuance and the Mitchell Discontinuance under New York law. In particular:
   (i) Did they give rise to claim preclusion under New York law such that Mr Redding and Mr Mitchell could not advance claims in connection with their Performances and/or the Recordings, including for infringement of their performers' property rights in the Performances or for infringement of copyright in the Recordings?
   (ii) Alternatively, would it be an abuse of process, within the doctrine of *Henderson v Henderson* (1843) 3 Hare 100, to assert such claims in these proceedings?

(6) Is the PPR Claim precluded by reason of the Releases and/or the Discontinuances, being arrangements and/or agreements within the meaning of the Transitional Provisions and, if so, were the Defendant's acts which are complained of done pursuant to those arrangements and/or agreements?

Further defences

(7) Did the conduct of Mr Redding and Mr Mitchell (and/or their successors) grant implied licences to the Defendant to exploit the Recordings and/or Performances?

(8) Was the conduct of Mr Redding and Mr Mitchell (and/or their successors) such as to estop or preclude any challenge to the Defendant exploiting the Recordings and/or Performances, on the basis of estoppel, laches, delay and/or the claim being an abuse of process on the ground that it cannot now fairly be tried?

(9) Is the claim improperly constituted by reason of the Claimants' failure to join the necessary parties to the action and, if so, can any relief be granted?

54. I have found it convenient, in the course of this judgment, to apply some re-ordering to my consideration of the above issues.

The factual evidence

55. In terms of factual evidence the Claimants adduced the evidence of four witnesses, only one of whom was required to attend for cross examination. Those witnesses were as follows:

(1) Aysha Mitchell – Ms Mitchell is the daughter of Mitch Mitchell. Ms Mitchell was not required to attend for cross examination. Accordingly her witness statement, dated 27th August 2025, stood as her unchallenged evidence.

(2) Nancy McNaughton – Ms McNaughton is the sister of Deborah McNaughton. Deborah McNaughton was the partner of Noel Redding, in Ireland, for the last five years of his life. Mr Redding left his entire estate to Deborah McNaughton. On her death, Deborah McNaughton left her entire estate in equal shares to Nancy McNaughton and another sister, Alexis McNaughton. Nancy McNaughton was not required to attend for cross examination. Accordingly her witness statement dated

1st September 2025, with some agreed redactions to remove inadmissible material, stood as her unchallenged evidence.

(3) Keith Dion – Mr Dion describes himself in his witness statement (the description was not challenged) as a professional musician, published author, award winning film maker and record producer. The Defendant raised objections to the admissibility of Mr Dion's witness statement. I ruled on these objections at the outset of the Trial. For the reasons set out in a judgment which I delivered after hearing the argument on admissibility, I decided that the witness statement should be admitted into the evidence, with the excision of the final paragraph. Mr Dion was not required to attend for cross examination. Accordingly his witness statement dated 3rd September 2025, with the exception of the final paragraph and an earlier agreed redaction to remove some other inadmissible material, stood as his unchallenged evidence.

(4) Edward Adams – Mr Adams is one of the two directors of the First Claimant, and the sole director of the Second Claimant. Mr Adams' evidence was that he has considerable experience in the music industry, through a number of different companies. Mr Adams was the person who arranged for such rights as Mr Redding and Mr Mitchell had, at the times of their deaths, to be assigned to the Claimant companies. It was also Mr Adams who arranged the litigation finance for the pursuit of the Claims in this action.

56. The Defendant did not adduce any evidence from a witness of fact.

57. The factual evidence adduced by the Claimants was fairly short. The witness statements ran, in total, only to some 20 pages. I did not find any of the evidence in the witness statements to be particularly helpful to my determination of the key issues in the Trial. The reality is that the principal actors in relation to JHE and the Recordings, meaning the Band Members and the Producers, are all now dead. Equally, there is no one who can now give direct evidence of the circumstances in which the Releases were executed and the Discontinuances were filed. It is no criticism of the witnesses of fact called by the Claimants to observe that none of them were able to give evidence of any of the key events in this case, with the consequence that their evidence was largely irrelevant.

58. The net result of this situation was that the key factual evidence in the Trial comprised the documentary evidence and, in particular but without downplaying the relevance of other documents, the Recording Agreement, the Releases and the Discontinuances. Some of the evidence in the documents was the subject of hearsay notices. There were issues with the weight to be attached to various parts of the documentary evidence. These issues fall to be considered in relation to the particular issues to which they are relevant. There are however two items of documentary evidence, which were the subject of a hearsay notice, to which I should make specific reference at this stage.

59. First, by a hearsay notice dated 4th September 2025 the Claimants sought to introduce various documents into the evidence. The first of these documents was a book entitled *"Are You Experienced: The Inside Story of the Jimi Hendrix Experience"*. This book, which I will refer to as **"the AYE Book"** was written, as an autobiography, by Mr Redding, together with a Ms Carol Appleby as co-author. The AYE Book deals, amongst many other matters, with the story of JHE, from its formation to its break up, and with the subsequent career and tribulations of Mr Redding, principally in relation to his involvement in disputes over royalties in respect of the earnings of JHE.

60. At the pre-trial review there was objection from the Defendant to the Claimants simply relying upon the AYE Book, with no identification either of what extracts from the work were relied upon, or of what part of the pleaded case those extracts were said to go to. At the suggestion of the Defendant, which I accepted at the pre-trial review, this problem was resolved by the Claimants providing a further schedule which itemised those pages from the AYE Book which were relied upon, together with an identification of the relevant parts of the pleaded case. The relevant extracts in the AYE Book, on the specified pages, were identified by red lining.

61. The specified extracts from the AYE Book were thereby admitted into the evidence before me at the Trial. It seems to me however that little weight can be given to this evidence. I say this for two reasons. First, the content of the AYE Book suffers from all the usual problems which attend hearsay evidence; principally the problem that it is not possible to conduct any probing of the evidence, such as it is, which can be found in the AYE Book. Second, and more fundamentally, the AYE Book is certainly an interesting read, as the autobiography of a rock musician and a member of JHE, but its value in terms of evidence relevant to the issues which I have to decide is very strictly limited. On those occasions when the Claimants sought to rely on the content of the AYE Book it rapidly became apparent that the relevant content was far too opaque to be of much, if any, evidential value.

62. Second, by the same hearsay notice the Claimants sought to introduce into the evidence a series of articles from music industry publications spanning the period between 1982 and 2009. These documents were referred to as *"the Technology Documents"*. I will use the same expression to refer to these publications. In summary, the Claimants sought to rely on the Technology Documents in order to demonstrate the state of market knowledge over the years as to the technology for the delivery of music. The Claimants' counsel put the case this way in their skeleton argument for the Trial:

> *"134. Taken together, these documents* [the Technology Documents] *demonstrate that there was a long, incremental and highly contested technological journey from the purely physical, carrier-based market of the 1960s/70s to today's intangible access-based streaming environment where the consumer can access practically limitless music, use it to create playlist*[s] *for sharing and does not own the music listen*[ed] *to in any meaningful sense."*

63. The Claimants' case was that the Recording Agreement and the Releases had to be construed by reference to the state of market knowledge at the time when these agreements were made. This, in turn, was relevant to the pleaded questions of what methods of exploitation of the Recordings would have been in the reasonable contemplation of the parties at the time when the Recording Agreement was entered into, and what was the extent and scope of the Releases.

64. At the pre-trial review the Defendant objected to the admission of the Technology Documents on a number of grounds. For the reasons set out in a judgment which I delivered at the pre-trial review I deferred the question of admissibility to the Trial. I also required the Claimants to serve a further schedule itemising, in the case of each of the Technology Documents, what facts were sought to be established, and what pleaded issue or issues those facts were said to go to. The extracts from the Technology

Documents relied upon by the Claimants were also further sidelined in red, for ease of reference.

65. This further itemised schedule was provided. At the Trial the Defendant renewed its objections to the admissibility of the Technology Documents. After hearing argument on these renewed objections, and for the reasons set out in the same judgment which dealt with the objections to Mr Dion's evidence, I decided that the Technology Documents should be admitted into the evidence.

66. Notwithstanding my decision on the admissibility of the Technology Documents, I am bound to say that I did not find the Technology Documents to be particularly helpful. The Claimants' case was that the Technology Documents constituted trade evidence of the kind which is admitted in trade mark and passing off cases; see the judgment of Birss J (as he then was) in *Fenty v Arcadia Group Brands Ltd (t/a Topshop)* [2013] EWHC 1945 (Ch), at [35]. I accept the principle, but I was not persuaded that the series of articles from music industry publications which comprised the Technology Documents is properly characterised as falling into this category of evidence. I did not find the Technology Documents to be of much assistance in determining what the state of market knowledge was at any particular time. More fundamentally, it did not seem to me that the state of market knowledge was necessarily of central importance, in resolving issues over the scope of the relevant provisions of the Recording Agreement and the Releases. In terms of whether a particular clause in a particular agreement extended to the delivery of music by digital download and digital streaming, the authorities to which I was taken seemed to me to require concentration on the terms of the particular clause, as opposed to what was known or not known at any particular time.

67. I am prepared to accept, indeed it was not clear to me that this was really in dispute between the parties, that modern methods for the delivery of music, by which I mean digital downloading and streaming of music, were not known or foreseen in the music industry at the time when the Recording Agreement and the Releases were entered into. I accept that this is demonstrated by the Technology Documents, although it might be said to be sufficiently obvious to be a matter of which I can take judicial notice. Beyond this however, I am doubtful that the Technology Documents have much evidential value, in terms of what I have to decide.

68. It is convenient also to mention, in the context of the Technology Documents, that Mr Howe raised, in his oral opening submissions at the Trial, a number of objections to matters relied upon by the Claimants which, so he submitted, were unpleaded. One of these objections was that the Claimants were relying upon the proposition, which I have just accepted, that the relevant parties could not have contemplated digital downloading and streaming at the time when they entered into the Recording Agreement and the Releases. The Defendant's case was that this was unpleaded. This alleged gap in the Claimants' pleaded case was relied upon by Mr Howe, in his submissions in support of the Defendant's objection to the admission of the Technology Documents. I did not accept the argument that this part of the Claimants' case was unpleaded, for the reasons which I set out in my judgment on the admissibility of the Technology Documents.

The expert evidence

69. The Releases and the Discontinuances were governed by New York law. In these circumstances, with the permission of the court, each party called the evidence of an

expert in New York law. The relevant permission was granted by Deputy Master Jefferis, by his order made at the case and costs management conference, on 5th September 2024. The permission was in the following terms:

> *"14. Subject to filing and serving expert reports and complying with the directions at paragraphs 15 to 18 below, (1) the Claimants and (2) the Defendant each have permission to adduce oral evidence from one expert in the field of New York law on the following issues: the principles of New York law on (a) the construction of the Releases (but for the avoidance of any doubt, not the meaning of the Releases when applying those principles); and (b) the effect of the Discontinuances limited to one expert on each side."*

70. The Claimants called Dennis O. Cohen, an attorney admitted to practice in New York since 2004. Mr Cohen has practised in commercial law, specializing primarily in complex commercial litigation, and often concerning issues of contract law, copyright, and civil procedure. He was a litigation partner at two national US law firms, prior to founding his own firm in 2018.

71. The Defendant called Professor Jody Kraus, the Alfred McCormack Professor of Law and a full-time faculty member at Columbia Law School. Professor Kraus is a member of the New York Bar and, in addition to his teaching role, has served as an expert and as lead counsel in US litigation and arbitration.

72. The experts each produced a principal report and then, sequentially with Mr Cohen going first, shorter second reports. The experts also prepared a helpful joint statement, recording their areas of agreement and disagreement.

73. In terms of my overall assessment, I was impressed by both experts. Both experts produced detailed reports, which read well, and were clearly the product of a good deal of hard work and thorough research. Both experts displayed considerable expertise in their written and oral evidence. Both experts were clearly aware of their duties to the court and, it was clear, were seeking to assist me, to the best of their ability, in understanding the principles of New York law applicable to the construction of the Releases and to the effect of the Discontinuances. In summary, I found the evidence of both experts to be helpful. In their closing submissions the Claimants' counsel submitted that the case was a model example of how, even in hard-fought cases (as this has been), experts can rise above the fray and fully discharge their duties to assist the Court. I agree with this assessment. The Claimants' counsel invited me to commend both of the experts in my judgment. I consider it appropriate to accept this invitation. I commend both of the experts on their written and oral evidence.

74. In their closing submissions, both written and oral, the Defendant's counsel launched an attack on the credibility of Mr Cohen. His evidence was characterised as having *"raised a number of concerns"*. Amongst a string of alleged failures in his expert evidence, Mr Cohen was variously accused of (i) misunderstanding his role as an independent expert, (ii) frequently slipping into arguing his case for his instructing clients, (iii) selective quotation, (iv) having a tendency to misconstrue the New York authorities to which he referred, (v) attempting to fashion new arguments which were not in his expert report, (vi) giving speeches in the manner of an advocate, (vii) adopting positions which favoured the Claimants, and (viii) refusing to give ground when he should have done.

75. I was not persuaded by any of these criticisms. I prefer the submissions of the Claimants' counsel on the question of my overall assessment of the experts. The Defendant's criticisms were at odds with my own reading of Mr Cohen's reports. They were also at odds with my impressions formed after hearing the oral evidence of Mr Cohen, which occupied the third day of the Trial. It also seemed to me that the criticisms were not borne out by the material relied upon by the Defendant in support of its criticisms of Mr Cohen. It is not necessary for me to go through the entirety of this material, but I will pick out some of this material, as non-exhaustive examples of material which did not bear out the criticism made of Mr Cohen.

76. First, one of the expert issues between Mr Cohen and Professor Kraus was concerned with the extent of a doctrine, recognised by New York law, which was referred to as the fairly and knowingly made doctrine. The experts were agreed that a release could be set aside if, and to the extent that it could be demonstrated that it had not been fairly and knowingly made by the releasor. The issue was whether the doctrine was also capable of applying to the process of construction of a release, by way of interpretation and *"contextualisation"*. Mr Cohen was of the view that it could. Professor Kraus was of the view that it could not.

77. I will need to come back to this expert issue later in this judgment, but for present purposes the relevance of this particular dispute is that the Defendant's counsel accused Mr Cohen, in their written closing submissions, of (i) fashioning a new argument in this respect, which was not in his report, and (ii) citing a case, as support for his position, which did not in fact support his position. So far as the first accusation was concerned, I do not think that it is right to describe this part of Mr Cohen's evidence as a new argument. The argument that the doctrine could be used to contextualise a release was clearly stated in Mr Cohen's first report, at paragraph 76. Turning to the second accusation, the case in question was *Johnson v Lebanese American University* 84 A.D.3d 427 (2011), a decision of the Supreme Court, Appellate Division (First Department, New York). With due respect to the judgment of the majority of the judges in that case, it is not entirely easy to discern what was being said in the judgment in relation to the fairly and knowingly made doctrine. There is certainly room for two views as to what the judgment says about the scope of the doctrine. It follows that Mr Cohen was quite entitled to take the view which he did of the judgment, whether or not I decide to accept that view. I should, in fairness, record that Mr Howe rowed back on this particular criticism in his oral closing submissions, acknowledging the confusing nature of some of the language in the judgment.

78. Second, in relation to the Discontinuances, the Claimants argued that both Discontinuances were ineffective, because they had not been signed by all parties to the Supreme Court Claim. I will, again, need to come back to this argument later in this judgment. For present purposes the relevant point is that the Defendant's counsel accused Mr Cohen, in their written closing submissions, of ignoring key premises of the reasoning in two of the New York cases which were engaged by this issue. In my view, this was not a fair criticism. The experts were agreed that the New York authorities were, at the least, split on the question of whether the absence of party's signature from a discontinuance was fatal to its effectiveness. It was clear from Mr Cohen's written evidence and his evidence in cross examination that Mr Cohen had not ignored any key premises. Rather, he had considered the relevant case law, and come to a view.

79. Third, and finally, in support of their accusation that Mr Cohen made speeches in the manner of an advocate the Defendant's counsel, in their written closing submissions, made reference to a passage from Mr Cohen's oral evidence where Mr Cohen deployed the image of a spectrum to illustrate his point that releases fell into a category of contracts which were subject to careful consideration, in terms of their context, in deciding what was and was not contemplated by the parties when they entered into the release. The relevant passage of cross examination, in its most relevant part, was in the following terms **[T3/35/22-36/21]**:

> *".....Yes, we can look at the context of any contract. We are more encouraged to look at the context in a release. So rather than perhaps stating that a release is something other than a contract, we're looking more at a -- perhaps we could think of it as a spectrum, whereas in some contracts we would be more encouraged to look within the four corners. But in a release, we are on the other end of the spectrum. We are encouraged to look more at the context.*
> *Q. Do you have any authority for that proposition or not?*
> *A. It's written right here in Mangini, as we just discussed. It is true, quoting Mangini now:*
>
> > *"It is true that a general release is governed by principles of contract law. There is little doubt, however, that its interpretation and limitation by the parol evidence rule are subject to special rules". That right there is an acknowledgment that it is both a contract, subject to the rules of contract interpretation, but also, yes, we apply some special rules.*
>
> *Q. I don't see the court there saying there's a spectrum of contracts of which releases are at one end, where you have to look specially at the context.*
> *A. No, those are my words, not the court's."*

80. I found the image of a spectrum to be useful, in understanding what Mr Cohen was saying as to the importance of context in New York law, when construing releases. The image of a spectrum, or a sliding scale (to give an equivalent phrase), is a routine part of lawyers' language when describing the operation of a particular principle of law. Leaving aside the question of whether Mr Cohen was right in this particular part of his evidence, and leaving aside the point that this evidence was, in common with the remainder of Mr Cohen's evidence, carefully nuanced, I could detect no hint of an advocate making a speech in this or any other part of Mr Cohen's evidence.

81. In terms of my overall assessment of the experts, and in terms of differences between the experts, I consider that the following comment is justified. I did find that Professor Kraus was generally better able, particularly in his oral evidence, to identify and explain the principles of New York law relevant to the construction of the Releases and the effect of the Discontinuances, and also to explain why he favoured a particular view of the law, in those areas where there was a lack of clear guidance in New York law on a particular point. This no doubt reflected the distinguished academic background of Professor Kraus. It did not however cause me to think that Professor Kraus was necessarily right, and Mr Cohen necessarily wrong, on any particular point in issue between the experts.

82. Drawing together all of the above analysis of the expert evidence, it seems to me that the present case is not one where it is appropriate generally to prefer the evidence of one expert over the other, in relation to the issues between the experts. So far as those issues exist and require my resolution, and assuming that each such issue is one where I have to go one way or the other, it seems to me that I must decide whose view I prefer in

relation to each such issue, drawing on the evidence of New York law provided to me by the experts.

The Recording Agreement

83. Both the Copyright Claim and the PPR Claim require a close consideration of the terms of the Recording Agreement, pursuant to which the Recordings were made. It is therefore convenient, at this stage, to explain the structure of the Recording Agreement, and to set out certain key provisions in the Recording Agreement.

84. As I have said, the Recording Agreement was entered into, on 11th October 1966, between the Band Members (Mr Redding, Mr Mitchell and Jimi Hendrix), collectively described as *"the Artistes"* in the Recording Agreement, and the Producers, Mr Jeffery and Mr Chandler, who are also referred to as *"the Producers"* in the Recording Agreement. The recitals to the Recording Agreement provided as follows:

> *"WHEREAS:*
>
> *(1) The Artistes together at present form a group of musical performers professionally known as JIMI HENRIX EXPERIENCE*
>
> (2) *The Producers are desirous of acquiring the exclusive services of the Artistes for the purpose of making and exploiting sound recordings of musical performances rendered by the Artistes and of enhancing and promoting the professional reputations and success of the Artistes"*

85. By clause 1 the Artistes agreed to record for the Producers exclusively for a period of seven years. The obligations of the Artistes were then set out in clauses 2 and 3.

86. By clause 4 the Artistes granted to the Producers *"the following rights and licences"*. The rights and licences were then set out in sub-clauses (i) to (iv). I should set out all four sub-clauses:

> *"(i) To have assigned to it the copyright in any arrangements or transcriptions of musical works made by the Artistes for the purposes of the said sound recordings*
>
> *(ii) To use and publish their name or names as publicly known or as otherwise agreed upon by the parties with or without photographic or other likenesses of the Artistes as when and where the Producers shall think fit.*
>
> *(iii) To use and publish biographical and other information relating to the Artistes to be supplied by the Artistes for the purpose of labelling cataloguing advertising, and exploiting the sound recordings made hereunder*
>
> *(iv) To authorise any other person firm or company to do any of the acts and things in sub-clauses (i) (ii) and (iii) of clause 4"*

87. Clause 6 dealt with the rights which the Producers were to have (*"shall have"*) in respect of sound recordings made pursuant to the Recording Agreement:

> *"6. THE Producers shall have the following rights in respect of any sound recordings made hereunder:—*
>
> *(i) The copyright throughout the world in all sound recordings of performances of musical works by the Artistes*
>
> *(ii) The sole and exclusive rights to manufacture/sell lease assign licence distribute or otherwise use or dispose of the said sound recordings and records tapes or other reproductions by any method now known or*

hereafter to be known made therefrom at such prices and under such labels and trade names as the Producers shall think fit

(iii) The sole and exclusive right to perform publicly or permit the public performance of the said sound recordings including performance by broadcasting tape wire diffusion television or by any other means now known or hereafter to be known

(iv) The sole and exclusive right to record or use any of the said sound recordings on records in conjunction with recordings of musical performances by other artistes

(v) The right to authorise any other person firm or company to do any of the aforesaid acts in sub-clauses (i) (ii) (iii) and (iv) of clause 6."

88. Clause 7 set out certain obligations of the Producers, in the following terms:

"7. THE Producers agree to do the following acts and things during the continuance of this Agreement:-

(i) To obtain all necessary licences and consents for the making of the said sound recordings

(ii) To pay all costs incurred in making and exploiting the said sound recordings including royalties to any person firm or company

(iii) To procure suitable premises and equipment for the purpose of making the said recordings

(iv) To use their best endeavours to exploit all of the said sound recordings"

89. Clause 8 dealt with the sums to be paid to the Artistes during the continuance of the Recording Agreement. The opening part of clause 8 is in the following terms:

"8. THE Producers agree to pay to the Artistes jointly during the continuance of this Agreement by way of a commission to be divided between them according to their own absolute discretion such commission to be equal to:-"

90. It will be noted that what was to be paid pursuant to clause 8 was to be paid by way of commission and was to be divided between the Artistes *"according to their own absolute discretion"*. The payment provisions in clause 8 are fairly lengthy and complex. For present purposes I need only make reference to the right of deduction given to the Producers by sub-clause (v), which was in the following terms:

"(v) The Producers shall be entitled to deduct from the receipts of the Producers upon which commissions are calculated and thus adjust the calculation the following sums:-

(a) any expense incurred by the breach by the Artistes of Clause 2 (iv) hereof:

(b) any sum in respect of each sound recording title which the Producer may pay within 30 days after the proof of each record side for the services or accompanying musicians vocalists arrangers and copyists and for arrangements studio rentals and other costs of making the sound recording"

91. Clause 9 gave to the Producers the following rights of assignment, leasing or licensing:

"9. THE Producers may upon giving notice to the Artistes assign lease or licence the rights under this Agreement to any person firm or company whether for

a limited period or for the duration of this Agreement as it shall in its absolute discretion think fit"

92. Clause 10 gave to the Producers the option to extend the term of the Recording Agreement for a further period not exceeding six months. Clause 11 dealt with the Producers' rights of termination of the Recording Agreement, *"without prejudice to their rights in respect of a breach"*. Clause 12 gave the Producers a further right to extend the term of the Recording Agreement.

93. Clause 13 dealt with certain rights arising on the expiration or other termination of the Recording Agreement for any reason whatsoever, in the following terms:

> *"(a) UPON the expiration of or the other termination of this Agreement for any reason whatsoever the Producers shall nevertheless continue to have the right for a period of Five years after such termination or after the termination of any renewal period to sell in the normal course of business only all stocks of any record manufactured hereunder and shall continue to account to the Artistes for commission in respect thereof as hereinbefore provided*
>
> *(b) Upon the expiration of the aforesaid period of sale (hereinafter called the "sell-off period") then at the Artistes option and at the written request of the Artistes given not later than three months after the expiration of the sell-off period the Producers shall either destroy all duplicate tape recordings acetate masters metal mothers and any other derivatives of the Artistes recordings in the Producers possession at the date of the request under the supervision of any agent designated by the Artistes or shall deliver to the Artistes or to any agent designated by the Artistes all such material and in the event of the Artistes requiring delivery then the Artistes shall pay to the Producers the Artistes costs of manufacturing any records or other material and any actual expense incurred by them for packing and shipping and any other expense of whatsoever nature to which the Producers shall be put in complying with the terms of this sub-clause"*

94. I need not set out the remaining clauses 14-17 of the Recording Agreement. Clause 17 provided that the Recording Agreement was to be governed by and construed in accordance with the laws of the United Kingdom. As I have said, the construction of the Recording Agreement has been approached by the parties on the basis that it is governed by the laws of England and Wales. It seems to me that this is clearly the correct approach.

<u>The construction of the Recording Agreement</u>

95. The general principles which govern contractual interpretation are well-known and well-established. I did not understand there to be any dispute in this respect between the parties. I find particularly helpful the summary of these principles, as they emerge from the authorities, set out by Sir Geoffrey Vos, Chancellor (as he then was) in *Lamesa Investments Ltd v Cynergy Bank Ltd* [2020] EWCA Civ 821 at [18], adopting a passage from the judgment of the court below:

> *"i) The court construes the relevant words of a contract in their documentary, factual and commercial context, assessed in the light of (i) the natural and ordinary meaning of the provision being construed, (ii) any other relevant provisions of the contract being construed, (iii) the overall purpose of the provision being construed and the contract or order in which it is contained, (iv) the facts and circumstances*

known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions – see Arnold v Britton [2015] UKSC 36, [2016] 1 All ER 1, [2015] AC 1619 per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;

ii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 20;

iii) In arriving at the true meaning and effect of a contract or order, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract or consent order and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 17;

iv) Where the parties have used unambiguous language, the court must apply it – see Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2012] 1 All ER (Comm) 1, [2012] 1 Lloyd's Rep 34 per Lord Clarke JSC at paragraph 23;

v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 18;

vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see Rainy Sky SA v. Kookmin Bank (ibid.) per Lord Clarke JSC at paragraph 2 – but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 19;

vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2018] 1 All ER (Comm) 51, [2017] AC 1173 per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent– see Wood v Capita Insurance Services Ltd (ibid.) per Lord Hodge JSC at paragraph 13; and viii) A court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 20 and Wood v. Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 11."

96. At [23] Sir Geoffrey Vos repeated the words of Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 (at [12]), to the effect that the process of interpretation required is *"a unitary exercise"*, observing that:

"it starts with the words and the relevant context, and moves to an iterative process checking each suggested interpretation against the provisions of the contract and its commercial consequences. The court must consider the contract as a whole and give more or less weight to elements of the wider context in reaching its view as to its objective meaning."

97. There are two other matters which are conveniently mentioned in the context of the construction of the Recording Agreement.

98. First, in their arguments on the construction of the Recording Agreement, the Claimants placed some reliance upon what they argued was the one-sided nature of the Recording Agreement; in favour of the Producers. In particular, and in support of their argument that the Recording Agreement granted to the Producers no more than an exclusive licence to exploit the Recordings during the term of the Recording Agreement, the Claimants pointed to the fact that clause 8 of the Recording Agreement gave the Band Members, by way of commission, only very small percentages of the net earnings from the exploitation of the Recordings. This, in turn, was a reflection of the wider case presented by the Claimants at the Trial, which was that both Mr Redding and Mr Mitchell died in relative poverty, having suffered the unfairness and/or injustice of never having received their proper recognition or reward for their unique contributions to JHE and the music created by JHE.

99. So far as the construction of the Recording Agreement is concerned, it is perfectly legitimate for the Claimants to contend that if a particular construction of the Recording Agreement produces an apparently unfair result, that is a matter to be considered in the construction argument. It seems to me however that there is a need for some caution in this context, both in relation to arguments over the construction of the Recording Agreement and in relation to the wider case presented by the Claimants.

100. There is no claim in this action to set aside the Recording Agreement, either on the basis that it was unfair or on any other ground. It follows that I have to construe the Recording Agreement as it was entered into. It may be that its terms were unfair to the Band Members. It may be that its terms can be described in even more trenchant form. The Claimants' skeleton argument for the Trial included a quotation from the transcript of the argument in the Court of Appeal where Arnold LJ commented that *"it might be said that two and half per cent on 90 per cent was daylight robbery, even in 1966, let alone with the benefit of hindsight."*. I am not in a position to make a decision on questions of this kind. So far as the Recording Agreement is concerned, it seems to me that questions of fairness have only a strictly limited role to play, as identified in my previous paragraph. So far as the wider case is concerned, and so far as I am concerned with the law of England and Wales, the issues which I have to decide do not seem to me to engage abstract questions of fairness. Whether the position is any different in relation to New York law is a question I reserve to my consideration of the Releases and the Discontinuances.

101. Second, and although this may be said to be a matter which is not strictly one of construction of the Recording Agreement, it is convenient to mention at this point that the Defendant placed some reliance upon what is sometimes referred to as the presumption of regularity. This presumption, loosely translated from the Latin in which it was originally formulated, is a presumption that all things are presumed to have been

done duly and in the usual manner. The presumption can be relied upon, in an appropriate case, for the purposes of establishing that the terms of a contract have been carried out in accordance with its terms. The principle was explained by Lord Drummond Young in a Scottish case, *Trustees of the Scottish Solicitors Staff Pension Fund v Pattison and Sim* [2016] SC 284, delivering the opinion of the court, at [19]:

> *"[19] In considering transactions that have taken place a significant time in the past, there is a general presumption that all the necessary procedures have been properly followed, the result being that the burden of proving otherwise rests on any party who challenges the transaction. The presumption is generally referred to by the Latin maxim omnia praesumuntur rite esse acta, or in the full version found in Trayner, Latin Maxims and Phrases, omnia praesumuntur rite et solemniter acta esse: all things are presumed to have been done duly and in the usual manner. The principle is of wide application, and has been applied to commercial transactions: examples are found in Bain v Assets Co Ltd and Guthrie v Stewart. A recent example is Cumbernauld Housing Partnership Ltd v Davies, where the title to sue of a property factor was challenged on the ground that no document appointing the factor had been produced to the court. The maxim was invoked to establish the proper appointment of the factor, who had been acting as such for ten years (see para 12)."*

102. In the present case it seems to me that there is potential scope for the application of this principle, at least in relation to events concerning the Recording Agreement. The Recording Agreement was entered into many years ago. The persons who could have given evidence as to what was done or not done pursuant to its terms are now all dead. The circumstances of the present case seem to me to mean that, at least in principle, the presumption of regularity is relevant in my consideration of the available evidence.

Were the Band Members or the Producers the first owners of the Copyrights?

103. Pursuant to paragraph 11(1) of Schedule 1 to the 1988 Act, *"the question who was first owner of copyright in an existing work shall be determined in accordance with the law in force at the time the work was made."*. The law in force at the time when the Recordings were made, between 1966 and 1968, was the 1956 Act The relevant provisions of the 1956 Act therefore govern the question of who were the first owners of the Copyrights.

104. Section 12 of the 1956 Act dealt with copyright in sound recordings. Section 12(4) provided that, subject to the proviso in that subsection, the maker of a sound recording should be entitled to any copyright subsisting in the relevant recording by virtue of Section 12:

> *"(4) Subject to the provisions of this Act, the maker of a sound recording shall be entitled to any copyright subsisting in the recording by virtue of this section:*
>
> *Provided that where a person commission the making of a sound recording, and pays or agrees to pay for it in money or money's worth, and the recording is made in pursuance of that commission, that person, in the absence of any agreement to the contrary, shall, subject to the provisions of Part VI of this Act, be entitled to any copyright subsisting in the recording by virtue of this section."*

105. Section 12(8) defined *"the maker"* in the following terms:

"(8) For the purposes of this Act a sound recording shall be taken to be made at the time when the first record embodying the recording is produced, and the maker of a sound recording is the person who owns that record at the time when the recording is made."

106. The expression *"record"* was defined in Section 48(1) of the 1956 Act to mean the following:

> *"record" means any disc, tape, perforated roll or other device in which sounds are embodied so as to be capable (with or without the aid of some other instrument) of being automatically reproduced therefrom, and references to a record of a work or other subject-matter are references to a record (as herein defined) by means of which it can be performed;"*

107. In summary, the first owner of the copyright in a sound recording, where the 1956 Act applied, was the person who owned the master record/tape at the time when the recording was made. This was however subject to the proviso to Section 12(4), which applied where (i) a person commissioned the making the sound recording, and (ii) paid or agreed to pay for the making of the sound recording in money or money's worth, and (iii) the recording was made in pursuance of that commission. In that case the person commissioning the recording would be the first owner of the copyright, in the absence of any agreement to the contrary.

108. The meaning of the expression *"the maker of a sound recording"* was explained by Ferris J in *Springsteen v Flute International Limited* [1999] EMLR 180, at page 219, in the following terms:

> *"The meaning of "maker" is to some extent explained in section 12(8) and section 48. By section 12(8) the maker of a sound recording is the person who owns the record at the time when the recording is made. Section 48 provides that a "record" is*
>
> > *any disc, tape, perforated roll or other device in which sounds are embodied so as to be capable ... of being automatically reproduced therefrom.*
>
> *In the context of this case the relevant medium for each recording appears to have been a tape. The owner of each original recording is therefore the owner of the tape containing that recording."*

109. The Claimants' case is that the Band Members acquired first ownership of the Copyrights either because they were the makers of the Recordings, as owners of the relevant master records/tapes, or because they commissioned the making of the Recordings. The Claimants say that this position is supported by the terms of the Recording Agreement which, at the most, gave the Producers no more than an exclusive licence to exploit the Recordings, for the term of the Recording Agreement.

110. The Claimants also argued, in the alternative to the above arguments, that if ownership of the Copyrights was vested in the Producers by the Recording Agreement, such ownership reverted back to the Band Members on the termination of the Recording Agreement. This alternative argument was however abandoned in the course of the Trial.

111. The Defendant denied these arguments. The Defendant's case was that the first owners of the Copyrights were the Producers, as the makers of the Recordings, on the basis that (i) the Producers purchased and owned the master records/tapes on which the Recordings were first made, and/or (ii) the Producers were the persons who commissioned and paid for the making of the Recordings, and/or (iii) the parties expressly agreed, in the Recording Agreement, that the Producers would have ownership of the Copyrights.

112. In considering these arguments I can see that, in theory, one might start with the argument over what was agreed in the Recording Agreement, on the basis that if there was agreement in the Recording Agreement that the Copyrights were vested in one side or the other, it is not necessary to go into the factual questions of who owned the master records/tapes and/or who commissioned and paid or agreed to pay for the Recordings. It seems to me however that it is the factual questions which should be answered first; in particular in order to determine whether the proviso to Section 12(4) applies. I will therefore take the arguments over first ownership of the Copyrights in the same order as set out above, starting with the question of who owned the master records/tapes.

113. The starting point, in terms of the factual question of who was the maker of the Recordings, is the Recording Agreement itself. By clause 7(ii) and (iii) the Producers agreed to pay all costs incurred in making and exploiting the sound recordings, and to procure suitable premises and equipment for the purpose of making the recordings. The Claimants sought to argue that, because clause 7(ii) made specific reference to the *"making"* (i.e., pressing the vinyl records) and *"exploiting"* of the recordings, it excluded an obligation actually to pay for recording sessions or the master records/tapes on which the Recordings were made. In my view this is far too narrow a reading of clause 7(ii) and (iii). It seems to me that it would be bizarre, and would have made little commercial sense, if the Producers' obligations in clause 7 left a gap, in terms of who was to pay for recording sessions. It would be equally odd if the reference to procuring suitable premises and equipment in clause 7(iii) was confined to an obligation on the part of the Producers to procure those premises and equipment, without having to pay for them. It seems to me that the obligation to procure included an obligation to pay whatever sum was required in order to achieve the procurement. In summary, it seems to me that clause 7 imposed an obligation upon the Producers to pay for the recording sessions in which the Recordings were made and, in particular, to pay for the master records/tapes on which the Recordings were made.

114. It also seems to me to be appropriate, for the reasons which I have explained in the previous section of this judgment, to apply the presumption of regularity in this instance. By this, I mean that I regard it as appropriate to presume, in the absence of evidence to the contrary, that the making of the Recordings was carried in accordance with terms of the Recording Agreement. On the face of it therefore, and by reference to the terms of the Recording Agreement to which I have just referred, one would have expected the Producers to have been the individuals who paid for and became the owners of the blank recording media on which the Recordings were made.

115. Support for this case can be found in the only surviving document which provides direct evidence of who paid the costs of making the Recordings. There is an invoice from a company called De Lane Lea Music Limited, which owned recording studios. The invoice was addressed to the Producers. The invoice was dated 30th November 1966, which was shortly after the Recording Agreement was signed, and was also within the

period during which JHE's first album, Are You Experienced, was recorded. One of the studios at which this first album was recorded was De Lane Lea Studios. The subject matter of the invoice was a series of charges for a *"Recording session with JIMMY HENDRIX per Chas Chandler on 28th November 1966"*. The items in the invoice comprise three hours of recording time, two sets of 660 feet of Ampex tape, and a plastic reel.

116. Given the name of the company and the date of the invoice, I infer, and find that the studios referred to in the invoice were the De Lane Lea Studios, and that the recording session was one of the recordings sessions in which the first album was recorded. I infer, and find that this recording session constituted one of the Performances, and that the recording made in this recording session was one of the Recordings. Assuming that this invoice was paid by the Producers, and there is no evidence to suggest that it was not paid, this is some evidence that the Producers paid for and became the owners of the master records (tapes) on which the Recordings were made.

117. I note that an inference of this kind was drawn by Ferris J in *Springsteen*, in his reasoning at page 221 of the report:

> *"The entity which had entered into the CBS recording agreement was, as I have previously held, Laurel Canyon Productions, whose activities were taken over by Laurel Canyon Ltd soon after its incorporation on June 29,1972. I see no reason to doubt the evidence of Mr Appel that it was Laurel Canyon Ltd, or perhaps Laurel Canyon Productions in respect of the first few weeks, which made and paid for the arrangements with the 914 Studios. While it was the 914 Studios which provided the recording equipment and they may well have provided the blank tapes as well, in the absence of evidence to the contrary, of which there was none, I would infer that the arrangements with the 914 Studios were such that the blank tapes used for making recordings became the property of Laurel Canyon Ltd (or Laurel Canyon Productions) immediately before they were used for recording purposes."*

118. The same reasoning can be applied to the question of who commissioned the making of the Recordings. The meaning of *"commission"* in Section 12(4) of the 1956 Act is explained in the following terms, in Copinger and Skone James on Copyright (19th Edition 2025) at 4-34 (footnotes omitted):

> *"(c) What amounts to a commissioning?*
> *In general, the word "commission" means "order". This means more than "request" or "encourage". There must therefore come into existence a contract with mutual obligations, namely an obligation to create the work and an obligation to pay. While well-known personalities will often agree to their photograph being taken, even in a studio, without any commission by them being made, this is less likely to happen in the case of people in the ordinary walk of life, since in the latter case the photographer is unlikely to take the risk of no prints being ordered.[148] Of course, if there was either payment or an agreement to pay, it will normally be easy to conclude that a work was commissioned but it does not necessarily follow that this was so. The commissioning must obviously have taken place before the work is made."*

119. The terms of clause 7(ii) and (iii) of the Recording Agreement and the evidence of the invoice suggest that the Producers were the persons who commissioned and paid for the making of the Recordings.

120. The Claimants argued that, under the terms of the Recording Agreement, it was in fact the Band Members who paid for the Recordings. The argument relied upon clause 8(v)(b). I have quoted this provision in the previous section of this judgment. The provision gave the Producers the right to deduct from their receipts, upon which commission was payable:

> *"any sum in respect or each sound recording title which the Producer may pay within 30 days after the proof of each record side for the services of accompanying musicians vocalists arrangers and copyists and for arrangements studio rentals and other costs of making the sound recording"*

121. The Claimants said that this demonstrated that the Band Members were the persons who ultimately paid for the costs of making the Recordings, thereby constituting them the persons who owned the master tapes on which the Recordings were made and also constituting them the persons who agreed to pay for the costs of making of the Recordings, even if they did not actually commission the Recordings. In my view however this takes the concept of payment too far. I say this essentially for two reasons.

122. First, clause 8(v)(b) gave to the Producers a right of deduction, in respect of the costs of making the Recordings, from the commission which might otherwise be payable to the Band Members. I use the word *"might"* because, when the Recording Agreement was entered into, no one knew if there would be receipts against which this right of deduction could be exercised. This depended upon the success of JHE. Indeed, as I recall, there was no evidence at the Trial of the earnings of JHE which demonstrated that this right of deduction was capable of being exercised and was exercised against receipts, in respect of the costs of the Recordings. Given the conditional nature of the right of deduction, it seems to me wrong to describe clause 8(v)(b) as meaning that the Band Members fall to be treated as the persons who either paid or agreed to pay for the costs of the Recordings, for the purposes of the 1956 Act. Rather, it seems to me that clause 8(v)(b) gave to the Producers a conditional right of reimbursement in respect of their expenditure.

123. Second, it seems to me that the provisions of Section 12 of the 1956 Act are concerned with the position when the relevant recording was first made. It seems to me that what matters is who owned the master records on which the relevant recording was made, at the time when it was made, or who commissioned and paid for the recording to be made, at the time when it was made. I accept the Defendant's argument that it is not relevant to consider whether the paying party had contractual arrangements in place which might, subsequently, enable the paying party to recoup the relevant costs. The Claimants argued that the Producers were in the same position as a party who pays for something out of petty cash, with the Band Members as the parties who were contractually obliged to pay for each of the Recordings at the time when it was made. It seems to me that this analogy does not hold up. A person who pays for something out of petty cash will, normally, be an employee or representative of the relevant company or entity which is the party actually making the purchase. The employee or representative simply acts as the agent, for the purposes of making the payment. In the present case the Producers were clearly not in this position. By reference to the evidence of the surviving invoice and by reference to the evidence of the terms of the Recording Agreement, the Producers were the parties who arranged for the provision of the recording facilities and were contractually obliged to pay for those recording facilities. One can test the matter by asking who was contractually obliged to pay the providers of the recording studios and

the recording facilities. I find that the answer to this question, on the available evidence, was the Producers. Clause 8(v)(b) was concerned with a separate contractual arrangement, between the Producers and the Band Members, whereby the Producers might, depending upon the earnings of JHE, be able to recoup the recording costs from the Band Members.

124. Beyond my analysis above, I also return to the point that this particular argument of the Claimants only gets off the ground if the Producers were able to recoup the costs of making the Recordings from the earnings of JHE, pursuant to clause 8(v)(b). I have already made the point that I do not recall any evidence at trial which demonstrated that this was the case.

125. In the course of closing submissions at the Trial, I asked if there was any authority on the question of whether a person could be treated as paying or agreeing to pay for the making of a sound recording, in reliance upon a provision such as clause 8(v)(b). My understanding was that a provision such as clause 8(v)(b) was a common feature of recording contracts. On the basis of this understanding, I had anticipated that the same argument would have been raised and determined in other cases.

126. In response to this question Mr Johnson, for the Claimants, and Mr Riordan, for the Defendant, made reference to some further authorities in the oral closing submissions. I need make specific reference to only two of these authorities.

127. Mr Riordan relied, in particular, upon the decision of His Honour Judge Micklem, sitting as a High Court Judge in *Apple Corps Limited v Cooper* [1993] F.S.R. 286. The action was concerned with a dispute over the ownership and alleged infringement of copyright in certain photographs taken in 1967 by Michael Cooper, a professional photographer and the (by then deceased) father of the defendant in the action. The photographs were taken in connection with the preparation of the album cover for the Beatles' album Sergeant Pepper's Lonely Hearts Club Band. The question of ownership was governed by Section 4(3) of the 1956 Act, which was in similar terms to the proviso to Section 12(4):

> *"(3) Subject to the last preceding subsection, where a person commissions the taking of a photograph, or the painting or drawing of a portrait, or the making of an engraving, and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, the person who so commissioned the work shall be entitled to any copyright subsisting therein by virtue of this Part of this Act."*

128. In his judgment Judge Micklem reviewed a number of authorities relevant to his consideration of what was meant by *"commissions"* in Section 4(3). In particular, after citing the case of *Stackemann v Paton* [1906] 1 Ch 774, the Judge approved the following proposition, at page 296 of the report:

> *"Counsel for the plaintiff, however, relied on it for the proposition that, if a photographer takes photographs pursuant to a commission, assume sufficient consideration, and the photographs are rejected because they are no good, the photographer does not thereby get the copyright in the photographs. I did not understand counsel for the defendant to assert that he did. Acceptance or non-acceptance of the photographs taken pursuant to a commission duly established under section 4(3) has no relevance."*

129. After citing further authorities, the Judge stated as follows, at page 299:

> *"Counsel submitted that the word "commission" meant certainly more than a simple request, and relied on the observations of Pritchard J. for that proposition, but how much more he did not say, nor could anyone say, with clarity. It seems to me that the word "commission" in the subsection before me, as applied to the taking of a photograph, is just a grand word for "order" and that the earlier cases on copyright in photographs show that in the informal circumstances which often accompany the ordering of a photograph, a bare request has in the past been accepted by the courts as a sufficient trigger to an enquiry whether in all the circumstances an obligation to pay ought or ought not to be implied. It is difficult to say that the word "commission" in section 4(3) of the 1956 Act "implies" an obligation to pay, because the subsection itself expressly requires such an obligation, but it is not, I think, improper to suggest that it "connotes" such an obligation in the sense that it is naturally associated with payment.*
>
> *If there is a threshold above which a bare request must rise in order to amount to a commission to take a photograph as between a professional photographer and a stranger to him, in ordinary circumstances it has proved so low as to be almost imperceptible in the cases."*

130. The judge then proceeded specifically to the construction of Section 4(3). At page 300 he explained how subsection (3) operated in the case of a negative of a photograph:

> *"The object to which subsection (3) applies is a single negative regarded as an artistic work. What has to be shown to bring the work within the subsection is, first, that a person commissioned the taking of a photograph before the film was exposed and the negative made; secondly, that that person, the commissioner, agreed to pay for it - putting on one side for the moment precisely what the pronoun "it" stands for in the subsection - and agreed to pay for it before the film was exposed and the negative taken; and thirdly, that the negative was taken in pursuance of the commission."*

131. The decision of Judge Micklem was considered in some detail by Waller LJ in his judgment, with which Longmore LJ and Sir William Aldous agreed, in the Court of Appeal in *Ultraframe UK Ltd v Fielding* [2003] EWCA Civ 1805 [2004] R.P.C. 24. After citing the extract from the judgment in *Apple Corps* at page 300, which I have just quoted, Waller LJ went on to say this, at [33]:

> *"33 In exactly the same way as when exploring whether Mr Davies was employed, and posing the question whether he ever placed himself under an obligation to the company to work as an employee certain hours, or produce designs, the answer was a clear "no", so the answer as to whether he ever placed himself under an obligation at all to his company before he produced the designs to produce those designs is a clear "no". If in relation to any of the designs the question was posed—if it had not been produced would the company have been entitled to sue for a breach of contract for the failure to produce the same—the answer would have been obvious. The plain inference from the judge's findings of fact is that Mr Davies worked very hard for the companies and his business, but he made the designs when he considered it appropriate to do so, and he never placed himself under an obligation to produce those designs prior to their production."*

132. Mr Riordan drew a number of propositions from the analysis of Section 4(3) in *Apple Corps*, which he submitted were relevant to the meaning of the proviso to Section 12(4), and had been approved by the Court of Appeal in *Ultraframe*:
    (1) The commission is dispositive. If a photograph was rejected by the person making the commission, this did not mean that the photographer got the copyright in that photograph.
    (2) The obligation to pay must be absolute, and not conditional upon some future choice or contingency.
    (3) The obligation to pay must arise before the relevant article is made.
    (4) There was a three stage test in relation to Section 4(3), in order to obtain ownership of the copyright. The relevant person, claiming ownership of the copyright, had to have commissioned the taking of the photograph, before the film was exposed and the negative made. The relevant person had to agree to pay for the photograph before the film was exposed and the negative made. The negative had to be taken in pursuance of the commission.

133. In response to these submissions Mr Johnson placed reliance upon the judgment of Paul Baker QC, sitting as a High Court Judge in *James Arnold and Co. Ltd v Miafern Limited and others* [1980] R.P.C. 397. The facts of this case, and the issues which were decided by the judge in this judgment were complicated. In very brief summary a Miss Helen Anyimeluna applied to the organisers of a Festival of Arts in Nigeria for a franchise to produce festival scarves, with the symbol of the festival emblem on them. Miss Anyimeluna sought a manufacturer in Britain which could supply the scarves for the festival, using a third party company which specialised in the export of British goods to Nigeria. The third party company found James Arnold and Co. Limited, the plaintiff company in the action, which was a supplier of ties and ladies' scarves. After receiving instructions and material from Miss Anyimeluna, Mr Arnold of the plaintiff company got in touch with a company, which the Judge referred to as Kentex, which manufactured the heat transfer papers which would be required to print the relevant designs on to the scarves. This in turn required Kentex to go to a further company, Precision Printing Plates Limited (**"Precision Printing"**), to prepare the artwork, negative photographs and subsequent artefacts from which the paper itself would be printed. Ultimately, this design work was incorporated into what were referred to as rubber stereos, from which the heat transfer papers could be manufactured by Kentex.

134. The plaintiff's case was that these rubber stereos were engravings, within the meaning of Sections 3 and 48 of the 1956 Act, in which copyright subsisted, and that the plaintiff owned the copyright, which was said to have been infringed by the defendants.

135. The judge accepted that the rubber stereos were engravings, for the purposes of the 1956 Act. The judge then went on to consider the question of whether the plaintiff was the owner of the copyright in the engravings, which depended upon the correct interpretation of Section 4(3) of the 1956 Act. As I have explained, the rubber stereos were actually made by Precision Printing, on the order of Kentex. Kentex was itself instructed by the plaintiff company to supply the heat transfer papers. The judge did not find the question of ownership an easy one to answer. He set out his reasoning and decision on this question at page 404 of the report (the underlining is my own):

> *"I can also at this point deal with the question whether the plaintiff is the owner of the copyright in the engraving as I have found it. It is obvious from what I have said that no servant of the plaintiff company made any stereos or anything else*

bearing any degree of originality from which that design was produced. I do not regard the sketches of Mr. Arnold as having sufficient originality in their form of expression to be entitled of themselves to this copyright. The original contribution came from Mr. Wood and his staff. The stereos were in fact made by Precision Printing Plates Limited, as I have said, to the order of Kentex. It has been argued by Mr. Lloyd that copyright resides either in Precision Printing Plates as the authors of the work or in Kentex as the company which commissioned and paid for the plates. They undoubtedly did pay for the plates or rendered themselves liable to because an invoice has been produced showing this. This question depends on the correct interpretation of section 4(3) of the Copyright Act 1956, which I have already read. Mr. Lloyd says that Kentex commissioned the making of the engraving and either paid for it or agreed to pay for it in money. On the face of it that is a very attractive and cogent argument. Mr. Spalding argues on the other hand that in the case of commissioned works where part of the process is sub-contracted it is the person who commissioned the ultimate article and is to pay ultimately for the process who has commissioned the making of the engraving. With a little hesitation I accept that argument. Someone who orders a particular design to be made and executed by a particular method may fairly be said to have commissioned all the necessary articles to be made even though he may be unaware of the need for them. In this case Mr. Arnold ordered the design to be executed. Of course with Mr. Arnold's expert knowledge of the trade I have no doubt that he was fully aware of what was required. But one could easily postulate other cases. In the case, say, of Miss Helen, if she had committed herself, right from the outset, of paying for the samples, then she could have been said on this argument to have commissioned the necessary articles, and it is much more doubtful whether she would have known what artifacts were required to be made in the manufacturing process."

136. The judge thus accepted, with a little hesitation, the argument of the plaintiff that the plaintiff was the commissioning party, notwithstanding that the work of producing the rubber stereos was sub-contracted by Kentex to Precision Printing.

137. The judge also dealt with an argument that the plaintiff was not bound to pay Kentex for the stereos. The judge did not accept this argument. As he said, at pages 404-405.

"It was suggested that the plaintiff was not bound, otherwise than on a matter of honour, to pay Kentex for the plates and stereos and it is true that if a bulk order for paper had been placed at so much a sheet, a figure calculated by Kentex to include the originating costs, including the cost of making these stereos, no specific sum for the stereos would have been paid by the plaintiff. But a bulk order not having been placed, I have no hesitation in holding as a matter of law, and in the circumstances, that the plaintiff became liable to pay a reasonable sum for the work which Mr. Arnold ordered to be executed. The risk that Miss Helen would not place an order was clearly on the plaintiff and not on Kentex. If Miss Helen had placed an order, as I have mentioned, she would have commissioned the work, or might be argued to have commissioned the work, and not Mr. Arnold. The defendants' proposition that one looks at the immediate person who has commissioned the work, if anybody, would involve that a sub-contractor right down the line could hold others to ransom if any question of a repeat order arose and I cannot think that that is the object which section 5 4(3) is designed to achieve. So that on the whole—and I have found some of these questions most difficult—I come to the

conclusion that the plaintiff company has made out its claim to the title to the copyright in the rubber stereos."

138. Mr Johnson relied upon this case in support of the Claimants' argument, further to their argument in reliance upon clause 8(v)(b) of the Recording Agreement, that the Band Members had in fact commissioned the Recordings. The argument was that clause 7(iii) of the Recording Agreement was an agreement between the Producers and the Band Members for the Producers to procure the facilities required for the making the Recordings. This was, so it was submitted, the commissioning, within the meaning of Section 12(4), of the Recordings by the Band Members. By analogy with the analysis in *Arnold*, so it was submitted, the Band Members were in the same position as the plaintiff in *Arnold*. As such, the Band Members commissioned the recording facilities, by virtue of clause 7(iii) of the Recording Agreement, through the sub-commission of the Producers, in the same way that the plaintiff commissioned the making of the rubber stereos by Precision Printing in *Arnold*, through the sub-commission of Kentex. The agreement to pay required by Section 12(4) was then provided by clause 8(v)(b) of the Recording Agreement.

139. It seems to me that there are a number of problems with this further argument of the Claimants.

140. The first problem is that I accept the argument of the Defendant, which seems to me to be confirmed by the *Apple Corps* case, that the requirements of the proviso to Section 12(4) are cumulative. Each has to be satisfied, if ownership of the relevant copyright pursuant to the proviso is to be established. The person claiming ownership by virtue of the proviso must be able to demonstrate (i) that they commissioned the recording, (ii) that they paid or agreed to pay for the recording in money or money's worth, and (iii) that the recording was made in pursuance of that commission. I accept the Defendant's argument that the proviso is not satisfied if it is only the act of commissioning which can be demonstrated by the person claiming ownership of the relevant copyright. It seems to me, by analogy with the analysis of the equivalent proviso in Section 4(3) in *Apple Corps*, that all three of the conditions in the proviso to Section 12(4) have to be satisfied before ownership can be claimed pursuant to the proviso. If therefore the Claimants were right in their argument based upon clause 7(iii) of the Recording Agreement and the alleged analogy with *Arnold*, the Claimants still have to establish that they paid or agreed to pay for the making of the Recordings. This, in turn, requires the Claimants to establish that they can rely upon clause 8(v)(b) to render the Band Members the paying parties, for the purposes of Section 12(4). For the reasons which I have given, I have already rejected that argument.

141. The second problem is that I do not accept the analogy with *Arnold*. The relevant reasoning of the judge, which I have set out above, depended upon the fact that the plaintiff was the company which commissioned the relevant works, namely the heat transfer paper which it required to produce the scarves. Part of the work of producing the heat transfer paper was sub-contracted to Precision Printing, which produced the rubber stereos in respect of which the plaintiff made the claim to copyright. The judge accepted, with some reluctance, that this was sufficient to render the plaintiff the commissioning party in respect of the rubber stereos. It is however only necessary to set out these facts to see how far removed they are from the present case. Clause 7(iii) of the Recording Agreement seems to me to bear no resemblance to the process by which

the plaintiff commissioned the manufacture of the rubber stereos in *Arnold*. In relation to the procuring of the recording facilities, clause 7(iii) seems to me to have lain outside the actual process of procuring the recording facilities. Responsibility for procuring the recording facilities rested with the Producers. The Band Members were not involved in the procurement process. All they had was the benefit of a contractual obligation that the Producers would carry out this procurement process.

142. The third problem is that I accept the propositions which Mr Riordan drew from the *Apple Corps* case, as I have summarised them above, as propositions applicable to the operation of the proviso to Section 12(4) of the 1956 Act. Although this is essentially repeating a point I have already made, earlier in my analysis of the question of first ownership of the Copyrights, I accept that, in considering who is the commissioning party for the purposes of Section 12(4), and in considering who is the paying party for the purposes of Section 12(4), it is necessary to look at what happened when the recording facilities were first booked. I accept that it is not appropriate to include in the analysis a separate, subsequent and contingent obligation to reimburse the commissioning party, of the kind which can be found in clause 8(v)(b) of the Recording Agreement. Equally, I do not think that it is permissible, at least on the facts of this case, to look beyond the original booking of the recording facilities, in order to identify the commissioning party for the purposes of the proviso to Section 12(4) of the 1956 Act.

143. In summary therefore, and drawing together my analysis of the operation of the proviso to Section 12(4), I do not think that the Claimants can rely upon clause 8(v)(b) of the Recording Agreement, or upon any other provision of the Recording Agreement to establish that the Band Members paid or agreed to pay for the costs of the Recordings. Nor do I think that the Claimants can rely upon clause 7(iii) of the Recording Agreement, or upon any other provision of the Recording Agreement to establish that the Band Members commissioned the Recordings.

144. The Claimants also sought to point to various items of evidence which, so they argued, demonstrated that the Band Members did in fact ultimately pay for the costs of the Recordings. I was not however persuaded that any of these items of evidence come anywhere near being able to bear the evidential weight which the Claimants sought to place upon them. I will deal briefly with each of these items of evidence:
    (1) The Claimants sought to rely on two pages from the AYE Book (pages 28 and 106) as evidence that the Band Members were *"billed"* for the costs of the Recordings. Page 28 is part of Mr Redding's description of the Recording Agreement. There is a reference to the deduction of all recording costs from the accounting which the Producers were required to produce. It is hard to tell, but it looks as though this is a reference to the provisions of clause 8(v)(b), with which I have already dealt. Page 106 contains a description of what Mr Redding said was the first accounting provided to the Band Members. There is reference to JHE sharing ordinary expenses for a variety of items, including *"recording"*. Again, it is hard to tell from this fleeting reference, but if what Mr Redding said is taken at face value, it appears to reflect the provisions of clause 8(v)(b) being put into operation. As I have said, I have already dealt with clause 8(v)(b). While I am doubtful that it is appropriate to give any real weight to the content of the AYE Book, for the reasons which I have set out earlier in this judgment, if what is written is taken at face value, it is not evidence of the Band Members paying the costs of the Recordings; see my analysis of the Claimants' argument based upon clause 8(v)(b). Beyond this, I am

assuming that recording costs referred to by Mr Redding related to the costs of the Recordings. There is however no evidence to establish this. In summary, I do not think that the extracts from the AYE Book relied upon by the Claimants actually assist their case on the ownership of the Copyrights.

(2) The Claimants also asserted that there was no evidence that any advance was paid in respect of the first album, while it was said that an advance was paid to a Bahamian registered company called Yameta Company Limited (**"Yameta"**) pursuant to an agreement between Yameta and Warner Bros Records Inc which was dated 21st March 1967. I cannot see that either of these matters, if they reflected what actually happened, supports the case that the Band Members paid for the Recordings, either on an ultimate basis or otherwise.

(3) The Claimants also sought to rely upon an agreement entered into between Yameta, Warner Bros Seven Arts Records Inc, Jimi Hendrix and the Producers, which is dated 24th June 1968. I have looked at this agreement, but I could find nothing in the agreement which supports the case that the Band Members paid for the Recordings, either on an ultimate basis or otherwise.

(4) The Claimants also made reference to three documents which, so it was submitted, demonstrated that, after the time when the Recordings were made, the Band Members continued to pay for their own recordings and expected to pay for their own recordings:

   (i) The first of these documents is an alleged accounting for Mr Redding in respect of recording costs incurred by Mr Redding in 1969 and 1970 at Sound Center Inc and Electric Ladyland Studios. This cannot relate to the Recordings, because they were all made prior to 1969 and were not made at either of the studios referred to.

   (ii) The second of these documents is an accounting of Henry Steingarten dated 30th June 1971 for Jimi Hendrix, which shows what are said to be deductions for recording costs. Again, this cannot relate to the Recordings, as the costs postdate the Recordings, and appear to relate to Jimi Hendrix alone.

   (iii) The third of these documents constitutes a letter from a Los Angeles attorney, a Mr Branton, to a Mr Lewis of Hendricks & Lewis (I assume a firm of lawyers) in Seattle. The letter is dated 11th February 1993 and was, as I understand the letter, written on behalf of Al Hendrix. The letter asserts that during his lifetime, and contrary to the usual practice in the record industry, Jimi Hendrix paid for the costs of his own recordings *"and assigned the master to the record company, under a Distribution Agreement, the right to make and sell records from those masters for a term period."*. I accept that this assertion appears in this letter. The letter was however written long after the Recordings were made and, so far as the Recording Agreement and the Recordings were concerned, it seems to me that the relevant assertions in this letter were simply wrong. It may be that this is too harsh a judgment, because the next paragraph of the letter refers to Jimi Hendrix's ability to go into a studio and record because he was part owner with Mr Jeffery of the Electric Lady Studio. This appears to be a reference to a time after the Recordings were made, and to be a reference to Jimi Hendrix recording on his own. It is therefore possible that Mr Branton's reference to the lifetime of Jimi Hendrix is too wide, and refers to a time after the Recordings, when Jimi Hendrix was recording on his own.

   (iv) The Claimants relied on these three documents for the proposition that the Band Members *"continued"* to pay their own recording expenses, and

expected to pay for those recordings, in the time after the Recordings were made. It is quite clear, from even a short study of these documents, that they cast no light on what happened in relation to the making of the Recordings, and provide no evidence of any continuing practice.

(5) Finally, the Claimants sought to place further reliance on the AYE Book, at pages 124 and 157. Page 124 records Mr Redding's displeasure at discovering that $10,000 in studio fees had not been taken from his account, as he had asked, but had been paid by Warner Bros. Apparently, Mr Redding had *"planned going with Warners but with nothing owing, a clean slate"*. Page 157 was said to indicate recording expenses paid by the Band Members. The redlined section of page 157 does not seem to me to demonstrate anything of this kind. These two extracts from the AYE Book were said to be further evidence that the Band Members *"continued to pay their own recording expenses and expected to pay for those recordings"*. As with the other documents relied upon by the Claimants for this purpose, the specified extracts cast no light on what happened in relation to the making of the Recordings, and provide no evidence of any continuing practice.

145. Drawing together all of my analysis of the evidence and arguments on the questions of who were the makers of the Recordings and who commissioned and paid for the Recordings, my findings and conclusions are as follows:

(1) The evidence of the surviving invoice and the evidence of the terms of the Recording Agreement are sufficient to demonstrate, on the balance of probabilities, that the Producers were the owners of the master tapes on which each of the Recordings was made, at the time when each of the relevant Recordings was made. I therefore find and conclude, on the evidence, that the Producers were makers of the Recordings, within the meaning of the first part of Section 12(4) of the 1956 Act.

(2) The evidence of the surviving invoice and the evidence of the terms of the Recording Agreement are sufficient to demonstrate, on the balance of probabilities, that the Producers commissioned the making of the Recordings, that the Producers agreed to pay and did pay for the making of the Recordings, and that the Recordings were made in pursuance of those commissions. I therefore find, on the evidence, that the Producers commissioned the Recordings, that the Producers agreed to pay and did pay for the making of the Recordings, and that the Recordings were made in pursuance of those commissions. I therefore further find and conclude, on the evidence, leaving aside the question of whether there was *"any agreement to the contrary"*, and if it is assumed that the terms of the proviso in Section 12(4) were engaged, that the terms of the proviso were satisfied in the present case.

146. Thus far in my analysis, as I have just indicated, I have not considered the question of whether the reference to *"any agreement to the contrary"*, in the last part of the proviso to Section 12(4), is engaged in the present case. In other words, I have not considered the question of whether there was an agreement between the Producers and the Band Members as to the ownership of the Copyrights. It seems to me that there was such an agreement, in clause 6(i) of the Recording Agreement. Clause 6 provided that the Producers were to have (*"shall have"*) certain rights *"in respect of any sound recordings made hereunder"*. The rights referred to in sub-clause (i) comprised *"The copyright throughout the world in all sound recordings of performances of musical works by the Artistes"*. It is difficult to see how this could have been expressed more clearly. The Producers were to have the copyright in sound recordings made pursuant to the terms of

the Recording Agreement. This clearly included the Recordings, which were all made pursuant to the terms of the Recording Agreement.

147. The Claimants argued that clause 6 was insufficient to vest ownership of the Copyrights in the Producers, and did no more than grant an exclusive licence to the Producers in respect of the Copyrights, for the term of the Recording Agreement. In this context it is convenient to refer to the term of the Recording Agreement, without more, but I understood the Claimants' argument to be that the exclusive licence continued into the sell off period in clause 13(a) of the Recording Agreement. Where therefore I refer to the term of the Recording Agreement in the context of the Claimants' argument, it includes the additional sell off period, unless otherwise indicated.

148. In support of this argument the Claimants pointed to other provisions of the Recording Agreement which, so they argued, meant that clause 6(i) could not be read as granting more than an exclusive licence. I will take these provisions in turn:
    (1) The Claimants have pointed to the fact that there are references elsewhere in the Recording Agreement to assignment, which militate against clause 6(i) operating as an assignment. In my view this argument is misconceived, for two reasons. First, the fact that there is no reference to assignment in the opening words of clause 6 does not mean that the words *"shall have"* were not effective to vest ownership of the rights referred to in sub-clauses (i) to (iv) in the Producers. Second, this argument assumes that clause 6 needed to make reference to assignment, for the purposes of vesting ownership of the Copyrights in the Producers. This assumption seems to me to be wrong. I say this because this assumption engages the further assumption that ownership of the Copyrights would have been, but for clause 6(i), vested in the Band Members. I can see no reason why the parties to the Recording Agreement would have made this assumption, when the Recording Agreement was entered into. In summary, I cannot see that there needed to be specific reference to assignment to achieve the vesting of ownership of the Copyrights in the Producers. Beyond this, I am not convinced that there is much to be derived from comparing or contrasting the opening wording of clause 6 with references to assignment in other parts of the Recording Agreement. It is notable that clause 4 of the Recording Agreement refers, in terms, to the grant of licences. On the Claimants' argument, and if clause 6 granted no more than an exclusive licence to exploit the Recordings during the term of the Recording Agreement, one would expect to find the same reference to a licence or licences in clause 6. The wording is however different, which somewhat undermines this part of the Claimants' argument.
    (2) The Claimants said that if clause 6(i) constituted an assignment of the Copyrights to the Producers, the remaining sub-clauses of clause 6 would be unnecessary, because the rights set out in sub-clauses (ii) to (iv) would be vested in the Producers as owners of the Copyrights. I can see the argument, but I am not persuaded that it is sufficient to overcome the clear terms of clause 6(i). In my view much the better analysis is that sub-clauses (ii) to (iv) were intended to make it clear that the rights referred to therein were to be vested in the Producers, and were not subject to any kind of implied licence back to the Artistes.
    (3) Clause 8 of the Recording Agreement contained the obligation of the Producers to pay royalties to the Artistes during the continuance of the Recording Agreement. The Claimants say that it would have been *"outrageous"* for the Producers to have had the right to exploit the Recordings for the term of the Copyrights, while only having to pay royalties to the Artistes for the first seven years of the term of the

Copyrights. It seems to me that this argument is misconceived. The contrast between the limited term of the obligations in clause 8, and the absence of temporal limitation in clause 6 demonstrates that the rights vested in the Producers by clause 6 were not intended to be limited to the term of the Recording Agreement. This might well be said to have been unfair but, as I have already noted, I am not concerned with whether the terms of the Recording Agreement were fair or unfair, save to the limited extent that an element of unfairness in the Recording Agreement may be a matter to be taken into account in resolving an ambiguity in the construction of the Recording Agreement. If clause 8 was unfair, it seems quite clear to me that this unfairness cannot support a construction of clause 6(i) as granting no more than an exclusive licence.

(4) Clause 9 of the Recording Agreement permitted the Producers, on giving notice to the Artistes, to assign, lease or licence the rights under the Recording Agreement to other parties, whether for a limited period or for the duration of the Recording Agreement. It is said that this is inconsistent with the Producers having more than an exclusive licence to exploit the Copyrights during the term of the Recording Agreement, because if they had ownership of the Copyrights, they had the right to assign, lease or licence the rights therein for the term of the Copyrights. I see the argument, but it seems to me that there is not the inconsistency for which the Claimants argue. It seems to me that clause 9 is wider in its terms than the right, in clause 6(v), to authorise other parties to do the acts set out in sub-clauses (i) to (iv) of clause 6. There may be an overlap between the provisions, but it seems to me that there is not the inconsistency contended for by the Claimants. I should also add that even if the inconsistency does exist, in the terms contended for by the Claimants, this does not seem to me to be sufficient to subvert the plain meaning of clause 6(i).

(5) Clause 13(b) of the Recording Agreement granted an option to the Artistes, to be exercised within three months of the sell-off period in clause 13(a), to require the Producers either to destroy or deliver up all duplicate recordings stock and other items. The Claimants say that the provisions of clause 13 are consistent with the Producers having only an exclusive licence in respect of the Recordings, for the terms of the Recording Agreement. If the Producers owned the Copyrights, their rights to exploit the Copyrights continued after the expiration of the Recording Agreement, and there was no need for any sell off period or for the option in clause 13(b). Once again, I am not persuaded either that the inconsistency contended for by the Claimants does exist or, if the inconsistency does exist, that it is sufficient to subvert the plain meaning of clause 6(i). I say this for the following reasons:

   (i) It seems to me significant that clause 13(a) granted the benefit to the Artistes of receiving commission on stock manufactured under the terms of the Recording Agreement and sold during the sell-off period specified in clause 13(a).

   (ii) The Artistes also had the option of ensuring that existing stock was destroyed or handed over to them at the end of the sell-off period, thereby avoiding the stockpiling of stock by the Producers for sale after the end of the sell-off period without the payment of any commission to the Artistes.

   (iii) This suggests to me that the provisions of clause 13 were intended to be for the benefit of the Artistes, in terms of ensuring payment of commission on the sale of stock left over at the expiration of the Recording Agreement.

   (iv) The Defendant argued that the provisions of clause 13 were geared to a situation where the Band Members might have wished to re-record their

work, after the expiration of the Recording Agreement. In such a situation they had the ability, if they exercised their rights under clause 13(b), to ensure that no bank of stock was left over from the sell-off period, for the Producers to exploit. This seems to me a reasonable commercial explanation for the presence of clause 13 in the Recording Agreement.

(v) In these circumstances, I cannot see that the provisions of clause 13 are in conflict with the Producers owning the Copyrights. The reality was that clause 13 did not prevent the Producers from exploiting the Recordings, after the expiration of the Recording Agreement. The benefits conferred upon the Artistes by clause 13 only extended to left over stock produced pursuant to the terms of the Recording Agreement.

(vi) It is also a notable feature of clause 13(b) that it required, at the option of the Artistes, the destruction or delivery up of *"all duplicate tape recordings acetate masters metal mothers and any other derivatives of the Artistes recordings in the Producers possession at the date of the request"*. It was common ground that this list of items did not include the master tapes of the Recordings. If the Producers had no more than an exclusive licence to exploit the Recordings during the term of the Recording Agreement, it seems odd that they should be entitled to retain the master tapes of the Recordings.

149. Beyond the analysis in my previous paragraph, it seems to me to be significant that clause 6 of the Recording Agreement was not expressed to be limited in time. The same applies to the rights and licences granted to the Producers by the Artistes in clause 4. By contrast, the obligations of the Artistes in clauses 2 and 3 were limited to *"the continuance of this Agreement"*. Clause 1 established the exclusive recording period to be for the term of seven years. The obligations of the Producers in clauses 7 and 8 were also limited to *"the continuance of this Agreement"*. Other clauses were tied to the term of the Recording Agreement. The obvious inference is that where the parties to the Recording Agreement intended an obligation or right to be limited to the term of the Recording Agreement, they spelt this out. Where they did not intend this limitation to apply, as in clause 6, no such limitation was spelt out. None of this is consistent with the Recording Agreement granting to the Producers no more than an exclusive licence, for the term of the Recording Agreement, to exploit the Recordings.

150. Ultimately, it seems to me that clause 6(i) is clear and unequivocal. The Producers and the Band Members agreed that the Producers would have the copyright throughout the world in the Recordings; that is to say the Copyrights. There was no temporal or territorial limitation to this agreement. Nor were there any words used which qualified the words of ownership; namely *"shall have"*.

151. I have already concluded that the Producers were the makers of the Recordings, on the basis that they owned the master tapes on which the Recordings were first made. I have also concluded that the Producers commissioned the Recordings, that the Producers agreed to pay and did pay for the Recordings, and that the Recordings were made in pursuance of that commission. Even if however this was not the position, I also conclude that the Producers and the Band Members agreed, by clause 6(i) of the Recording Agreement, that the Producers would own the Copyrights, as and when the Recordings were made and the Copyrights came into existence.

152. In their skeleton argument for the Trial the Claimants' counsel contended that clause 6(iii) of the Recording Agreement did not, as a matter of construction, extend to what was referred to as the making available right; that is to say *"the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them"*, as set out in Section 20(2)(b) of the 1988 Act. The same right is also referred to in Section 182CA, in the context of performers' property rights. The Claimants' argument was that whoever was the first owner of the Copyrights, there had been no permission granted to the first owners of the Copyrights to make the Recordings or the Performances available to the public under the terms of the Recording Agreement, so that what is now the making available right is not included in the Copyrights. In oral opening Mr Malynicz, for the Claimants, accepted that if the Producers had been the first owners of the Copyrights, their ownership would cover the copyright restricted acts, including what is now the making available right. This was confirmed by Mr Johnson in the oral closing submissions. I took this to mean that the Claimants' argument that the ownership of the Copyrights did not extend to what is now the making available right was not pursued. I mention this because it is relevant when I come to consider the PPR Claim.

153. There is one further matter which I should mention, for the sake of completeness. At the outset of the Trial, the Claimants argued that the Producers were employees of Yameta, and entered into the Recording Agreement on behalf of Yameta, with Yameta as the undisclosed principal to the Recording Agreement. Yameta is the company, registered in the Bahamas, which entered into agreements, in 1967 and 1968, which were relied upon by the Claimants as evidence that the Band Members paid for the Recordings. As I have said, it does not seem to me that either agreement provides any support for the Claimants' case that the Band Members paid for the Recordings. The argument that Yameta was an undisclosed principal to the Recording Agreement was abandoned by the Claimants in their closing submissions. I will need to come back to the role of Yameta when I come to consider chain of title issues. For present purposes it is worth noting that even if Yameta had been undisclosed principal to the Recording Agreement, I do not see that this would have assisted the Claimants' case that the Band Members were first owners of the Copyrights.

154. Drawing together all of the above analysis, I conclude that the first owners of the Copyrights, both by virtue of Section 12(4) of the 1956 Act and under the terms of the Recording Agreement, were the Producers.

155. This has the consequence that the Copyright Claim fails. Regardless of whether the Defendant can demonstrate a valid chain of title to the Copyrights, which entitles the Defendant to exploit the Copyrights in the UK, the Claimants accept that if they cannot demonstrate first ownership of the Copyright Claim, then the Copyright Claim must fail. The Claimants do not suggest that Mr Redding or Mr Mitchell acquired any interest in the Copyrights subsequent to what I have found to be the first vesting of the Copyrights in the Producers. Nor do the Claimants pursue the claim for a declaration that no party has established ownership of the Copyrights. It is not in dispute that the Claimants can demonstrate a valid chain of title to whatever rights were held, respectively, by Mr Redding and Mr Mitchell, when they died. So far as the Copyright Claim is concerned however, this cannot assist the Claimants, given my decision that the Copyrights were never vested in Mr Redding or Mr Mitchell.

156. Accordingly, the Copyright Claim fails and falls to be dismissed.

What were the meaning and effect of the Recording Agreement, in relation to the PPRs?

157. In this section of the judgment I am dealing with two of the issues, as identified in the agreed list of the issues, which arise in the relation to the PPR Claim. The first issue is the question of the scope and duration of the consents granted under the Recording Agreement to fixation, commercial release and exploitation of the Performances. The second issue is whether those consents, such as they may have been, met the applicable standard of consent (if any) and whether the benefit of those consents was capable of being transferred.

158. The starting point is a brief explanation of what is meant by performers' property rights. I have had the benefit of an interesting and illuminating summary of the history of performers' rights in the skeleton arguments for the Trial. For present purposes however, and while keeping that history in mind, I can go straight to the 1988 Act. Initially Part II of the 1988 Act, brought into force on 1st August 1989, created two separate rights in performances. One was a personal and non-assignable right for performers in the exploitation of their performances. The other was a transferrable right for persons having an exclusive recording contract with a performer.

159. There have since been a number of amendments to performers' rights under Part II of the 1988 Act. As I have explained, I am concerned with performers' property rights, as they are called. The 1996 Regulations, which came into force on 1st December 1996, added the following three rights to Part II of the 1988 Act, as performers' property rights:
    (1) The right to reproduce recordings – Section 182A of the 1988 Act;
    (2) The right to distribute recordings – Section 182B of the 1988 Act;
    (3) The right to rent recordings – Section 182C of the 1988 Act.

160. The 2003 Regulations then added, as a further performers' property right, Section 182CA to Part II of the 1988 Act, which is the right to make recordings available to the public; for download or digital streaming. The 2003 Regulations came into force on 31st October 2003. It will be recalled that the Claimants did not pursue the argument, in the context of the Copyright Claim, that the first ownership of the Copyrights did not include the making available right.

161. One other matter to mention in this context, for the sake of completeness, is that Mr Redding died before the introduction of the making available right, on 31st October 2003, by the 2003 Regulations. In those circumstances Regulation 35(1) of the 2003 Regulations provided for the making available right to be exercisable *"by the person who immediately before commencement was entitled by virtue of section 192A(2)* [of the 1988 Act] *to exercise the rights conferred on the performer by Part 2* [of the 1988 Act] *in relation to that performance"*. Without going further into these provisions I have assumed that the relevant person in the present case entitled to exercise the PPRs, in the case of Mr Redding and prior to 31st October 2003, would have been his personal representative or his heir, Ms Deborah McNaughton. This was not a matter which appeared to be the subject of dispute between the parties which is why, earlier in this judgment, I have referred (without further explanation or strict accuracy) to the PPRs vesting in Mr Redding and his estate/heir.

162. It is next necessary to refer to the previous history of performers' rights. Prior to the entry into force of the 1988 Act, on 1st August 1989, performances were protected by a series of Performers' Protection Acts, dating between 1925 and 1972. These statutes did not confer a private law right on performers. Instead, they provided that a person who knowingly made and exploited illicit records, films and broadcasts of performances committed a criminal offence. Although these statutes created only criminal offences, the Court of Appeal decided, in *Rickless v United Artists Corp* [1988] QB 40, that the Performers' Protection Act 1963 did include at least some rights to the civil remedy of an injunction; see the judgment of Sir Nicholas Browne-Wilkinson VC (as he then was), with which the other members of the Court of Appeal agreed, at page 52 of the report.

163. What this meant was that the pre-1988 Acts were held, on the authority of *Rickless*, to create private rights for performers to give or withhold their consent to the recording and exploitation of their performances, which could be enforced by civil remedies.

164. This point can be taken further. The scope of sound recording copyright under the 1956 Act was limited to three exclusive rights. Certain of the criminal protections accorded to performers corresponded with these rights.
    (1) Section 1(a) of the Dramatic and Musical Performers' Protection Act 1958 prohibited the making of a record, directly or indirectly, of a performance without consent. This corresponded to Section 12(5)(a) of the 1956 Act, which gave the owner of a copyright in a sound recording the exclusive right to authorise the making of a record embodying the recording.
    (2) Section 1(c) of the Dramatic and Musical Performers' Protection Act 1958, which prohibited the public performance of a record so made. This corresponded to Section 12(5)(b) of the 1956 Act, which gave the owner of a copyright in a sound recording the exclusive right to cause the recording to be heard in public.
    (3) Section 3 of the Dramatic and Musical Performers' Protection Act 1958 prohibited the broadcasting of a performance without consent. This corresponded to Section 12(5)(c) of the 1956 Act, which gave the owner of a copyright in a sound recording the exclusive right to broadcast the recording.

165. The relevant point, for present purposes, is that performers' rights were not an unknown concept when the Recording Agreement was made. The performers' rights created by the 1988 Act and the subsequent Regulations lay in the future. Performers' rights did however exist prior to the 1988 Act and, as was subsequently established in *Rickless*, included the ability to enforce the same by civil remedies. It follows that the world in which the Recording Agreement was made was not a world where the question of the right to exploit performances did not need to be addressed in a recording agreement.

166. The next question is whether the Recording Agreement could, in principle, grant permission to the Producers to engage in acts falling within the scope of rights, namely the PPRs, which did not exist at the time of the Recording Agreement, and would not exist for another 30 years.

167. In their written and oral opening submissions the Claimants' counsel contended that this could not have occurred because it would have involved the assignment of a future chose in action; namely the PPRs, which did not exist at the time of the Recording Agreement. The Claimants' case was that the assignment of a future chose in action is not legally possible. This, in turn, provoked an objection from Mr Howe, in his oral opening

submissions at the Trial and as part of his complaint that various elements of the Claimants' case had not been pleaded, that this argument was unpleaded.

168. It seems to me that Mr Howe was right in this objection. The argument based on non-assignability of a future cause was not, so far as I could see, pleaded by the Claimants. Whether and, if so, to what extent, this would have mattered, given that this part of the Claimants' case was essentially an argument of law, were matters which I was not required to address. In the event I was not required to deal with this objection. This was because it was apparent that the Defendant's case in relation to the PPRs was not put on the basis of an assignment of a future chose in action, but rather on the basis that Mr Redding and Mr Mitchell had, by the Recording Agreement, *"agreed and consented to the fixation of the Performances in the Recordings, and to the commercial release and exploitation of the Recordings in all forms and formats then known or thereafter to be known"*. The quotation is taken from paragraph 27.1 of the Defendant's Amended Defence in the action. The Defendant's case was thus put on the basis that Mr Redding and Mr Mitchell had, by the Recording Agreement, given a consent to the fixation, commercial release and exploitation of the Performances sufficiently wide to avoid the acts complained of by the Claimants constituting a breach of the PPRs. The Defendant now claims to have the benefit of this consent. The Claimants' counsel described this as something of a departure from the Defendant's pleaded case, in their written closing submissions. There was however no pleading point taken and, in any event, it seems to me that the case based upon consent was pleaded in the Amended Defence, not least in paragraph 27.1, which I have quoted above.

169. The question of whether the Defendant now has the benefit of this consent, if it was created by the Recording Agreement, depends upon the answer to two further questions. The first question is whether the benefit of the consent was transferable at all, which is the last of the issues which I am considering in this section of this judgment. Accordingly, I will come to that issue at the end of this section of this judgment. The second question is whether the Defendant can show a chain of title between the Producers and itself, which is for the next section of this judgment. For present purposes, I am concerned with the question of whether the consent was created at all. Returning to the question of whether such a consent could, in principle, have been created by the Recording Agreement, I understood the Claimants to accept that, in principle, this was possible. Their argument was that, for a variety of reasons, to which I shall come shortly, such a construction of the Recording Agreement was not possible.

170. The next question is the nature or standard of the consent which was required, in the Recording Agreement, in order to demonstrate that the Band Members had given consents wide enough to avoid infringement of the PPRs. This question requires a little more explanation, as it might be said to contain two questions. The first question is what terms needed to appear in the Recording Agreement in order to achieve the construction contended for by the Defendant. That is a question of construction of the Recording Agreement, to which I shall come shortly. The second question, which is the question I am currently considering, is whether particular matters have to be demonstrated in order that the consent can be considered a valid consent, over and above simple agreement.

171. In this context, the Claimants argued that the burden was on the Defendant to establish that a sufficiently wide consent had been given, and that, in terms of the nature or standard of the consent, such consent had to be informed, prior, explicit and unreserved.

172. It seems to me clearly to be right that the burden is on the Defendant to establish that a sufficiently wide consent was given. The question of the nature or standard of the required consent seems to me to require more analysis.

173. In support of this part of their case the Claimants relied upon a series of EU authorities. In particular, the Claimants made reference to the decision of the Court of Justice in C-301/15 *Soulier and Doke v Premier Ministre and Ministre De La Culture Et De La Communication*, EU:C:2016:878, which was a case concerned with author's consent.

174. The essential facts of *Soulier* were that the French government had instituted a system for reproducing, in digital form, books which were out of print. The system provided for authors to make subsequent objection to this reproduction, if they chose to do so. This was successfully challenged by two authors, on the basis that it failed to give effect to their right to give or withhold their consent to such reproduction of their work, prior to the reproduction taking place. As the court explained, at [34] to [36]:

> *"34 It follows that, subject to the exceptions and limitations laid down exhaustively in Article 5 of Directive 2001/29, any use of a work carried out by a third party without such prior consent must be regarded as infringing the copyright in that work (see, to that effect, judgment of 27 March 2014, UPC Telekabel Wien, C-314/12, EU:C:2014:192, paragraphs 24 and 25).*
>
> *35 Nevertheless, Article 2(a) and Article 3(1) of Directive 2001/29 do not specify the way in which the prior consent of the author must be expressed, so that those provisions cannot be interpreted as requiring that such consent must necessarily be expressed explicitly. It must be held, on the contrary, that those provisions also allow that consent to be expressed implicitly.*
>
> *36 Thus, in a case in which it was questioned about the concept of a 'new public', the Court held that, in a situation in which an author had given prior, explicit and unreserved authorisation to the publication of his articles on the website of a newspaper publisher, without making use of technological measures restricting access to those works from other websites, that author could be regarded, in essence, as having authorised the communication of those works to the general internet public (see, to that effect, judgment of 13 February 2014, Svensson and Others, C-466/12, EU:C:2014:76, paragraphs 25 to 28 and 31)."*

175. The court went on, at [37]-[40], to accept that such consent could be implicit, but the circumstances in which such implicit consent needed to be admitted had to be strictly defined, and the relevant author had actually to be informed of the future use of their work and the means at their disposal to prohibit that use, if they so chose:

> *"37 However, the objective of increased protection of authors to which recital 9 of Directive 2001/29 refers implies that the circumstances in which implicit consent can be admitted must be strictly defined in order not to deprive of effect the very principle of the author's prior consent.*
>
> *38 In particular, every author must actually be informed of the future use of his work by a third party and the means at his disposal to prohibit it if he so wishes.*
>
> *39 Failing any actual prior information relating to that future use, the author is unable to adopt a position on it and, therefore, to prohibit it, if necessary, so*

that the very existence of his implicit consent appears purely hypothetical in that regard.

40 Consequently, without guarantees ensuring that authors are actually informed as to the envisaged use of their works and the means at their disposal to prohibit it, it is de facto impossible for them to adopt any position whatsoever as to such use."

176. The court reached its conclusion at [52]:

"52 Having regard to all of the foregoing considerations, the answer to the question is that Article 2(a) and Article 3(1) of Directive 2001/29 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, that gives an approved collecting society the right to authorise the reproduction and communication to the public in digital form of 'out-of-print' books, namely, books published in France before 1 January 2001 which are no longer commercially distributed by a publisher and are not currently published in print or in digital form, while allowing the authors of those books, or their successors in title, to oppose or put an end to that practice, on the conditions that that legislation lays down."

177. It will be seen that *Soulier* was not directly concerned with express consent, and does not lay down any particular standard or test, in terms of what can qualify as express consent. This was not in issue in *Soulier*. The case does identify the need for prior consent. The case also addresses what is required to be shown, in a case where it is said that there has been an implicit consent; see the judgment at [37]-[40]. The reference made by the court to the *Svensson* case was intended to demonstrate that, in that case, the author had given a consent of sufficient width to permit communication of the relevant works to the general internet public. The essential points decided by *Soulier* were that prior consent was required, that the circumstances in which it could be said that implicit consent had been given needed to be defined strictly, and that the relevant French legislation did not meet the requirement for prior consent.

178. This is clear from the references to the *Soulier* decision in another decision of the Court of Justice relied upon by the Claimants. In C-484/18 *Spedidam*, EU:C:2019:970, the court said this at [38]-[40] (the underlining is my own):

"38 It is also important to note that the rights guaranteed to performers by Article 2(b) and Article 3(2)(a) of Directive 2001/29 are of a preventive nature, in that any act of reproduction or making available to the public of the fixations of their performances requires their prior consent. It follows that, subject to the exceptions and limitations laid down exhaustively in Article 5 of the directive, any use of such protected subject matter by a third party without such prior consent must be regarded as infringing the holder's rights (see, to that effect, judgments of 16 November 2016, Soulier and Doke, C-301/15, EU:C:2016:878, paragraphs 33 and 34, and of 7 August 2018, Renckhoff, C-161/17, EU:C:2018:634, paragraph 29 and the case-law cited).

39 That interpretation is in line with the objective of providing a high level of protection for performers' rights referred to in recital 9 of Directive 2001/29, as well as the need, mentioned, in essence, in recital 10 of that directive, for performers to obtain appropriate remuneration for the use of fixations of their performances in order to enable them to continue their creative and artistic work.

> *40 However, as the Court, in its judgment of 16 November 2016, Soulier and Doke (C-301/15, EU:C:2016:878, paragraph 35), has previously pointed out with regard to authors' exclusive rights, Articles 2(b) and Article 3(2)(a) of Directive 2001/29 do not specify how the performer's prior consent is to be given, so that those provisions cannot be interpreted as requiring such consent to necessarily be expressed in writing or explicitly. On the contrary, it must be concluded that those provisions also allow the consent to be expressed implicitly, provided, as the Court pointed out in paragraph 37 of that judgment, that the conditions under which implicit consent may be accepted are strictly defined, in order not to deprive the very principle of prior consent of any effect."*

179. It does not seem to me that *Soulier* or *Spedidam*, as cited by the Claimants in this context, do establish that some higher standard of consent applies as a result of EU law. The same seems to me to apply to the other EU authorities cited by the Claimants, with which I do not need to deal individually. I include in this latter reference the trade mark cases to which I was referred by the Claimants. It is apparent, from reading these cases, that they were, so far as relevant, essentially concerned with questions of when consent was required and, where consent was required, whether such consent could be implied and, if so, what was capable of constituting such consent. It seems to me that the relevant point established by *Soulier* and *Spedidam* is that implicit consent can be relied upon, but what constitutes implicit consent is strictly defined. The relevant circumstances which are relied upon as giving rise to the implicit consent need to demonstrate that informed prior consent was clearly given. In the case of an express consent the position is necessarily different, because one can look at the terms of the express consent in order to see what it does and does not cover.

180. I am also not convinced that there is a real dispute in this context. It is being said by the Defendant, in the present case, that the Band Members gave a consent or consents in the Recording Agreement which were sufficient to allow exploitation of the Performances, by methods for the delivery of music which were unknown in 1966, without infringement of the PPRs. It seems to me that if this case is to be made good, it needs to be demonstrated that there is a clear and explicit statement of such consent to be found in the Recording Agreement. This effectively engages the concepts of the consent being required to be prior, explicit and unreserved. It also seems to me to engage the concept of informed consent. If the consent was given in clear terms, it is reasonable to assume that the parties understood the effect of that consent.

181. I also note that in *Spedidam* the court said this, at [39]:

> *"39 That interpretation is in line with the objective of providing a high level of protection for performers' rights referred to in recital 9 of Directive 2001/29, as well as the need, mentioned, in essence, in recital 10 of that directive, for performers to obtain appropriate remuneration for the use of fixations of their performances in order to enable them to continue their creative and artistic work."*

182. I understood Mr Howe to accept, in his oral closing submissions that this was no more than a statement of what had always been the law in the UK in relation to intellectual property rights. They are considered important, and are subject to a high level of protection. Mr Howe's essential point, which I accept, was that the EU line of authorities

relied upon by the Claimants did not set any new or higher standard of protection, but simply reflected the high level of protection enjoyed by intellectual property rights.

183. I therefore conclude that I should approach the question of whether a consent was given by the Band Members to the exploitation of the Performances and, if so, to what extent, while keeping in mind (i) the high level of protection enjoyed by intellectual property rights, and (ii) the need for there to be a clear and explicit statement of such consent.

184. This clears the way for me to consider whether consent was given in the Recording Agreement to the exploitation of the Performances and, if so, whether that consent was given in sufficiently wide terms to avoid infringement of the PPRs.

185. The Defendant relies, principally, upon clause 6(ii) of the Recording Agreement. For ease of reference, I repeat clause 6 in its entirety:

> *"6. THE Producers shall have the following rights in respect of any sound recordings made hereunder:—*
>
> *(i) The copyright throughout the world in all sound recordings of performances of musical works by the Artistes*
>
> *(ii) The sole and exclusive rights to manufacture/sell lease assign licence distribute or otherwise use or dispose of the said sound recordings and records tapes or other reproductions by any method now known or hereafter to be known made therefrom at such prices and under such labels and trade names as the Producers shall think fit*
>
> *(iii) The sole and exclusive right to perform publicly or permit the public performance of the said sound recordings including performance by broadcasting tape wire diffusion television or by any other means now known or hereafter to be known*
>
> *(iv) The sole and exclusive right to record or use any of the said sound recordings on records in conjunction with recordings of musical performances by other artistes*
>
> *(v) The right to authorise any other person firm or company to do any of the aforesaid acts in sub-clauses (i) (ii) (iii) and (iv) of clause 6."*

186. On its face, clause 6(ii) is very wide. It grants extensive rights to make use of the Recordings *"by any method now known or hereafter to be known made therefrom"*. It is of course the case that PPRs did not exist in 1966, but I accept the Defendant's argument that it is necessary to focus upon what acts of exploitation of the Recordings were being consented to by the terms of the Recording Agreement, and in particular by the terms of clause 6, as opposed to legal rights. Indeed, this seems to me to be consistent with the Claimants' concession, which in my view was a correct concession, that the Copyrights carried with them the making available right, even though this did not exist at the time of the Recording Agreement.

187. I have already decided that the rights granted by clause 6 were not limited in time; see my analysis of the question of who had first ownership of the Copyrights. The rights granted in respect of the Recordings included the right to *"otherwise use or dispose"* of the Recordings. The methods which the Producers were permitted to use included any method *"hereafter to be known"*. I have accepted that digital downloading and streaming were not known in 1966, but on the face of it they qualify as methods of delivery *"hereafter to be known"*. Given the width of clause 6(ii) it is difficult to see why the

rights granted to the Producers by clause 6 were not wide enough to encompass the doing of the acts which are protected by Sections 182A-182CA.

188. The Claimants argued that the rights which appear in the sub-clauses of clause 6 were limited by the opening words of clause 6, which imposed a limit on the rights granted to the Producers by the use of the words *"in respect of the sound recordings"*. I accept the point, but I do not think that the reference to sound recordings in the opening part of clause 6 can do the work required of it by the Claimants' argument. The Claimants' argument is that a consent to exploit sound recordings cannot be a consent to exploit performers' property rights. Sound recording copyright and performers' property rights are different things in law. I accept the legal distinction between the Copyrights and the PPRs, but this seems to me to miss the key point, which is that the rights were granted *"in respect of the sound recordings"*, as opposed to being confined to the sound recordings. The Recordings contain the Performances. As such, I cannot see why the rights granted by clause 6 could not include rights or consents to exploit the Performances.

189. This seems to me to be borne out by the structure of the sub-clauses in clause 6. As I have already decided, ownership of the Copyrights (the copyrights in the Recordings) was dealt with by clause 6(i). It seems clear to me that clause 6(ii) was intended to have much wider scope, and to secure the consent of the Artistes to a wide variety of acts of exploitation of the Recordings, including the acts now protected by the PPRs.

190. The Claimants also argued that the words *"otherwise use"* were limited to rights to exploit tangible items. Clause 6(ii) was concerned with the tangible physical recordings, and the tangible physical products made therefrom; meaning records, tapes and other physical forms of reproducing the sound recordings *"by any method now known or hereafter to be known"*. In support of this argument, the Claimants relied upon two principles of construction. The first of these principles was what is referred to as the eiusdem generis (of the same type) principle. The argument was that because clause 6(ii) was concerned with physical manufacture, reproduction, distribution and sale of sound recordings, the words *"otherwise use"* were subject to the same physical limitation. The second of these principles was the presumption that each clause in an agreement is intended to have effect. If therefore a particular construction of one clause in an agreement leaves another clause redundant, the presumption against redundancy may be relied upon as a reason to reject that construction.

191. I do not think that either of these principles can be applied in the present case. It seems to me that clause 6(ii) was not confined to physical methods. The words used were *"manufacture/sell lease assign licence or otherwise use or dispose of the said sound recordings"*. This clearly includes methods of exploitation going beyond the manufacture and distribution of physical products. As such, I do not think that it is right to treat clause 6(ii) as being confined to physical tangible actions, or to treat the words *"otherwise use or dispose of"* as being limited to physical methods of delivery of the music contained in the Recordings.

192. So far as the presumption against redundancy was concerned, the Claimants' argument was that sub-clause 6(iii) and 6(iv) would not have been required, if clause 6(ii) was as wide as the Defendant contended. I do not think that it is appropriate to apply the presumption in the present case. While I can see that there is an overlap between the

rights granted by clause 6(ii), on the Defendant's construction, and the rights granted by clause 6(iii) and (iv), I do not think that it is possible to say that the latter two sub-clauses are left in a state of redundancy. I can readily see that the Producers, notwithstanding the width of clause 6(ii), would have considered it sensible to spell out the rights referred in sub-clauses (iii) and (iv). Beyond this, it seems clear to me that the scope of the rights granted by clause 6(ii) was very wide. I do not think that it is possible, as a matter of language, to read down clause 6(ii) to a narrower, physical limit on the basis of the presumption. It does not seem to me that there is an ambiguity in clause 6(ii) in respect of which the presumption can be applied.

193. I should also add, in this context, that while I do not think that it is necessary for the Defendant to rely on clause 6(iii) for this purpose, given the width of clause 6(ii), clause 6(iii) does seem to me to be wide enough to function as a consent to the public performance of the Recordings, including by digital download and streaming. Again, the reference is to *"any other means now known or hereafter to be known"*.

194. Drawing together the above analysis, I conclude, as a matter of construction of the Recording Agreement, that the rights granted by clause 6 of the Recording Agreement, specifically by clause 6(ii) of the Recording Agreement, included a consent, granted by the Band Members to the Producers, to do all of the acts which would, but for such consent, infringe the PPRs. I will refer to this consent as **"the Consent"**.

195. This brings me on to the question of whether the benefit of the Consent was assignable. The Claimants argued that it was a personal consent, which was not capable of assignment. In support of this argument the Claimants pointed to various cases in which it was held that a publisher's agreement could not be assigned. The Claimants also relied upon the following extract from Performers' Rights (6th Edition), Richard Arnold (Arnold LJ), at 9-37. I have included 9-36 in my quotation, because it explains what follows in 9-37:

> *"*[9-36] *Another important question is as to the assignability of performers' contracts: that is to say, whether the other contracting party can assign the benefit of a contract containing a performer's consent to the exploitation of his or her performance to a third party. There are four main classes of case: (i) those in which the agreement is silent as to whether it is assignable or not; (ii) those in which it is expressly or by necessary implication provided not to be assignable at all; (iii) those in which it is expressly or by necessary implication provided to be assignable without restriction; and (iv) those in which it is expressly or by necessary implication provided to be assignable, but with some restriction. These will be considered in turn.*
>
> [9-37] *If a contract is silent as to whether it is assignable by the other party or not, the general rule is that benefit of the contract may be assigned unless the contract involves personal confidence or personal skill so that the identity of the person who is to perform it is material, in which case it is not assignable. Thus it has been held that neither an author nor his publisher can assign the right to performance of the other's obligations under a publishing agreement, although the fruits of performance, and in particular the author's right to receive royalties, may be assigned. On this basis, most contracts which require the performer to give performances will not be assignable by the other party if the contract is silent. (This assumes that the contract does not amount to an assignment of performers' property rights since in that event the performers' property rights would in the*

absence of any restriction be assignable like any item of property. This question has already been considered above.) The position is less certain if the performer is not required to give performances, but merely consents to the exploitation of performances that have already been recorded. Even in such a case, however, it may well be possible to say that personal confidence, if not personal skill, is involved. An obvious example is if the performer is required to make personal appearances to promote the exploitation. Even in the absence of such a requirement, the performer may be able to show that artistic concerns or the effect of exploitation upon his or her reputation is such that the contract should be treated as personal."

196. In my view the Claimants' argument is misconceived. As the extract from Arnold makes clear, the general rule is that the benefit of a performer's contract may be assigned, unless the contract involves personal confidence or personal skill so that the identity of the person who is to perform it is material, in which case it is not assignable. The Consent was not a contract for the Band Members to give performances. It was a contract permitting the Producers to carry out acts of exploitation of the Performances. Nor was the Consent the equivalent of a publishing contract, of the kind under consideration in the relevant cases cited by the Claimants.

197. Nor as it seems to me, was there any temporal limitation expressed in the Recording Agreement, so far as assignment of the Consent was concerned. The Claimants argued that the right of assignment only existed during the term of the Recording Agreement, on the basis that the right of assignment arose pursuant to clause 9 of the Recording Agreement. I do not accept this argument, for two reasons. First, the argument assumes that, in the absence of an express right of assignment in the Recording Agreement, the benefit of the Consent could not be assigned. I do not think that this is right, for the reasons set out in my previous paragraph. Independent of this, clause 6(v) granted to the Producers the right, which was not limited in time, to authorise any other party *"to do any of the aforesaid acts in sub-clauses (i) (ii) (iii) and (iv) of clause 6"*. If therefore, contrary to my view, the benefit of the Consent could only be assigned if this was expressly authorised by the Recording Agreement, it seems to me that such authority was granted to the Producers by clause 6(v).

198. I therefore conclude that the benefit of the Consent was capable of assignment, and was thus capable of being transferred.

199. Drawing together all of the above analysis, my conclusions in relation to the two issues which I am considering in this section of this judgment can be summarised as follows:
    (1) By the Consent Mr Redding and Mr Mitchell consented to the exploitation of the Performances in sufficiently wide terms to avoid infringement of any of the rights contained within the PPRs. The Consent was not limited in time, and was not limited to any particular methods for the delivery of music.
    (2) I am doubtful, for the reasons which I have given, that there is some special *"applicable standard"* which the Consent was required to meet. If I am wrong in saying this, and if there was an applicable standard of the kind contended for by the Claimants, I am satisfied that the Consent met that standard.
    (3) In my view the benefit of the Consent was capable of being transferred. Whether it was so transferred is for the next section of this judgment.

Is Experience the successor to the benefit of any consents given by the Recording Agreement?

200. I have decided that the Consent was granted to the Producers by the Recording Agreement, and that the benefit of the Consent was capable of being transferred or assigned by the Producers to third parties. The next issue is whether the Defendant can point to a chain of title/chain of assignments of the benefit of the Consent, between the Producers and Experience. If the benefit of the Consent did find its way to Experience, it is not in dispute that the Defendant, by sub-licence from SME, has the benefit of the Consent.

201. The chain of title relied upon by the Defendant is set out in Schedule 2 to the Amended Defence. It was also helpfully set out in the form of a flowchart by the Defendant's counsel at the Trial. For the purposes of this judgment, it is not necessary for me to go through every transaction which is set out in Schedule 2. Instead, I will concentrate on those transactions where it is said by the Claimants that there is a break in the chain. In relation to those transactions to which I do not make express reference, I confirm that I am satisfied, on the evidence, that a valid chain of title has been shown in respect of those transactions.

202. Before I come to these transactions I should deal with an argument by the Claimants that there was an assignment by the Producers of their rights under the Recording Agreement to Yameta, the Bahamian company mentioned earlier in this judgment. The argument that Yameta was the undisclosed principal of the Producers in relation to the Recording Agreement was, as I have indicated, abandoned by the Claimants. They did however maintain the argument that there was an assignment by the Producers of their rights under the Recording Agreement to Yameta, which has now been lost. In support of this argument the Claimant relied upon two agreements. The first of these agreements was an agreement entered into between Yameta and Warner Bros Records Inc, dated 21st March 1967, which was expressed to grant rights to Warner Bros in the United States and Canada which included rights in respect of the master recordings of performances by JHE. The second of these agreements was an agreement, dated 15th May 1967, between Yameta and a company called Compagnie Phonographique (Barclay), which was expressed to grant rights to Barclay, in various European and French former colonial and overseas territories, in respect of recordings by three bands, one of which was JHE.

203. There was also a third agreement, entered into between Yameta and the Producers and dated 11th November 1968. The recitals to this agreement were in the following terms:

> *"WHEREAS certain disputes and differences have arisen between all of the aforesaid parties and they are desirous of settling and compromising their differences upon the terms and conditions hereinafter set forth; and*
>
> *WHEREAS the artists managed by Jeffery and Chandler shall be deemed to include JIMI HENDRIX, NOEL REDDING, MITCH MITCHELL, the group known as the JIMI HENDRIX EXPERIENCE, the group known as the EIRE APPARANT, the group known as the SOFT MACHINE, the group known as JESSE's FIRST CARNIVAL, MADELINE BELL, TARO DELPHI, and the group known as THE PACE."*

204. This third agreement contained extensive provisions for the assignment by Yameta to the Producers, or for agreement to make such assignment of Yameta's rights in respect of the artists referred to in the agreement, who included JHE.

205. The Claimants also sought to rely, in this part of their submissions, on copies of record labels from 1967 and 1968 which, so it was submitted, made reference to Yameta in such a way as to suggest that it held the Copyrights. The Claimants also made reference to what was said about the role of Yameta by Mr Redding in the AYE Book.

206. It was not entirely clear to me what the relevance of all this material was, following the abandonment by the Claimants of their argument that Yameta acted as undisclosed principal of the Producers in relation to the Recording Agreement. In their written closing submissions the Claimants' counsel argued that if the Defendant wished to rely on rights passing through Yameta, it was too late to do so now, as this had not been pleaded. It is not however the Defendant's case that the benefit of the Consent passed through Yameta. The agreements relied upon by the Defendant, for the chain of title to Experience, do not rely upon any agreements with Yameta or any title said to have been derived from Yameta. The Defendant's case was that the agreements with Warner Bros and Barclay, on their terms, disclosed no more than that the Producers had licensed certain rights to Yameta. The Defendant also pointed out that, whatever the scope of what might have been licensed or assigned to Yameta, any such rights came back to the Producers pursuant to the terms of the agreement of 11th November 1968.

207. In case I am mistaken in my understanding of the relevance of this part of the case, I should briefly state my findings and conclusions in this respect:
    (1) I am not satisfied that there is any lost assignment to Yameta of the Producers' rights under the Recording Agreement.
    (2) I do not think that the existence of such an assignment is demonstrated either by the agreement of 21st March 1967 or the agreement of 15th May 1967. At best, it seems to me that these agreements are evidence of the Producers having entered into some form of licensing agreement or agreements with Yameta, in relation to the rights of the Producers under the Recording Agreement.
    (3) In any event, and whatever the nature of the agreement or agreements entered into between Yameta and the Producers, prior to the agreement of 11th November 1968, any rights previously licensed or assigned to Yameta came back to the Producers pursuant to the agreement of 11th November 1968.
    (4) I do not think that any weight can be given to the evidence of the record labels which was relied upon by the Claimants. The position is far too opaque to attach weight to this evidence.
    (5) The same applies to the evidence, such as it is, in the AYE Book. It is clear that Mr Redding had no direct knowledge or understanding of the role of Yameta. The extracts from the AYE Book which were relied upon by the Claimants seem to me to fall well short of offering any reliable evidence in relation to the question of what, if any, rights under the Recording Agreement passed from the Producers to Yameta.
    (6) I therefore conclude that the Defendant has no need to demonstrate any title passing through Yameta, in support of its case that, by a chain of transactions, the benefit of the Consent passed from the Producers to Experience.

208. I now turn to the transactions which are relied upon by the Defendant for its chain of title and, specifically, to the transactions which are challenged by the Claimants. Although I refer to challenge by the Claimants, I should repeat that the initial burden is upon the Defendant to demonstrate that each link in its chain of title is secure.

209. The first agreement in issue is an agreement dated 22nd October 1969 made between Mr Chandler, a company called Jeffery & Chandler Inc (**"the J&C Company"**), and Mr Jeffery. The agreement was governed by New York law. The Defendant's case is that, by this agreement, Mr Chandler assigned all his rights under the Recording Agreement to Mr Jeffery and the J&C Company. This is said to have been achieved by clause 5 of this agreement, which provided as follows:

> *"FIFTH: CHANDLER hereby assigns, conveys, transfers and sets over to J and C the entire right, title and interest, including all benefits and privileges, of CHANDLER in and to any and all agreements for publishing, record production and management, formal and informal, which have previously been entered into during Chandler's and Jeffery's joint association or by J and C while Chandler was a stockholder thereof."*

210. The opening part of the agreement, after naming the parties to the agreement, stated that the J&C Company and Mr Jeffery were *"hereinafter jointly and severally called "J and C"*. Mr Chandler was defined as *"Chandler"*. The Claimants took two points on this agreement. The first point was that clause 5 of the agreement was an assignment only to the J&C Company. The basis of this argument was that the reference to Chandler as a stockholder in J and C could only be a reference to the J&C Company, as Mr Chandler could not have been a stockholder in Mr Jeffery. As such the reference in the first part of clause 5 to J and C as person to whom the assignments and other disposals were being made could only be a reference to the J&C Company, and not to the J&C Company and Mr Jeffery. The second point was that clause 5 did not refer to any property or copyrights. It was simply assigning rights in contractual agreements.

211. I do not think that there is merit in either of these points. While I bear in mind the principles of construction under New York law which emerged from the expert evidence, as they applied to this agreement, I do not find it necessary to make specific reference to these principles, so far as these points of construction are concerned.

212. Dealing with the first point it seems quite clear to me that the first reference to J and C in clause 5 was a use of this term in the manner in which it had been defined in the agreement; namely as a reference to Mr Jeffery and the J&C Company. The second reference, it seems equally clear to me, was a reference to the J&C Company alone, given the individual reference to Mr Jeffery in the same part of the clause, and given the reference to Mr Chandler as a stockholder in the J&C Company. Strictly speaking, of course, identification of the J&C Company as J and C was not permissible, because J and C had been defined to have a wider meaning. In reality it is obvious that this second reference to J and C in clause 5 was a reference to the J&C Company, which was not intended to, and did not confine the earlier reference to J and C, in clause 5, to the J&C Company. Similar examples of references to J and C being confined to the J&C Company can be found in clauses 1 and 4.

213. Turning to the second point, the chain of title dispute is only concerned with the transmission of the benefit of the Consent. The benefit of the Consent was clearly a right and/or a benefit of Mr Chandler in the Recording Agreement, and thus fell within the description of what was being transferred by clause 5 of the agreement, whatever the extent of what was being transmitted by clause 4. Beyond this however, I simply cannot see how the description of the property being transmitted by clause 5 was not wide

enough to encompass all the property vested in Mr Chandler by virtue of the Recording Agreement including, if this had been a relevant issue, Mr Chandler's share of the Copyrights.

214. I therefore conclude that there is no defect in the chain of title relied upon by the Defendant, so far as the agreement of 22nd October 1969 is concerned.

215. The skeleton argument of the Claimants for the Trial took a point on an agreement dated 20th May 1970, between Mr Jeffery and Mr Redding. This point appeared however to be predicated on the hypothesis that the rights under the Recording Agreement were held by Yameta rather than the Producers. I have rejected this hypothesis. In these circumstances it does not seem to me that it is necessary to address the agreement of 20th May 1970, which is not, in any event, relied upon by the Defendant as part of its chain of title.

216. The next agreement where a dispute arises is an agreement dated 1st February 1972 entered into between the Hendrix Estate, Mr Jeffery and other related entities. This agreement is not relied upon by the Defendant as an agreement by which the benefit of the Consent is said to have passed. Instead, it is relied upon by way of context. In these circumstances I need not go into this agreement at this stage.

217. The next agreement referred to in the submissions of the parties is an agreement dated 1st March 1974 entered into by Al Hendrix and a Panamanian company called Presentaciones Musicales SA (**"PMSA"**). The recitals to this agreement provided as follows:

> *"WHEREAS, Jimi Hendrix, an internationally known musician and composer, is now deceased, and*
>
> *WHEREAS, HENDRIX has inherited from the Estate of Jimi Hendrix all of the rights which are covered in this Agreement, and*
>
> *WHEREAS, PMSA wishes to acquire the assets and is willing to assume the liabilities covered by this Agreement."*

218. The opening part of clause 2, and clause 2(b) of this agreement provided as follows:

> *"(2) As special consideration for this Agreement, PMSA agrees to assume a broad range of claims and liability which may or may not be due from HENDRIX and as to which HENDRIX wishes to be relieved of liability. PMSA assumes the following:*
>
> *[...]*
>
> *b) The Estate of Michael Jeffery (Jeffery having been the manager of Jimi Hendrix and having died in March 1973) has a claim against HENDRIX for twenty percent (20%) of all the earnings of the Estate of Jimi Hendrix domestically and for forty percent (40%) of all foreign earnings. Conversely the Estate of HENDRIX has a claim against the Jeffery Estate under a prior settlement agreement said claim amounting to approximately One Hundred and Sixty Thousand Dollars ($160,000.00). HENDRIX assigns to PMSA and PMSA relieves HENDRIX of all liability from the claims of the Jeffery Estate including all expenses of litigation. It is agreed that PMSA is to receive any and all rights from the Jeffery Estate which*

may be negotiated or result from litigation over the claims of the Jeffery Estate. PMSA guarantees that HENDRIX will receive all sums due HENDRIX from the Jeffery Estate in connection with the aforementioned settlement agreement (estimated at One Hundred and Sixty Thousand Dollars ($160,000.00), and HENDRIX assigns to PMSA the right to any claim which the Estate of Jeffery may have against the Estate of HENDRIX."

219. The Defendant's case was that this agreement is important, because it made clear that whatever resulted from the claims by Al Hendrix against the estate of Mr Jeffery would be assigned to PMSA, in return for PMSA assuming the risk and burden of the litigation. The point taken by the Claimants in relation to this agreement was that Mr Jeffery had no rights under the Recording Agreement, either because they were owned by Yameta or because they were owned by the J&C Company. I have already rejected the first of these contentions, and I cannot see on what basis it can be said that the J&C Company had an interest in the Recording Agreement to the exclusion of Mr Jeffery. Mr Jeffery was one of the original parties to the Recording Agreement and, jointly with the J&C Company, acquired Mr Chandler's rights under the Recording Agreement by the agreement of 22nd October 1969.

220. This brings me to the next agreement where an issue is raised, which is an agreement dated 26th February 1981 entered into between PMSA and Maxwell T. Cohen. Mr Cohen was expressed to be a party to the agreement in his capacity as an ancillary administrator of the estate of Mr Jeffery and as an officer of various corporations controlled by Mr Jeffery's estate. The agreement was governed by New York law. The agreement is relied upon by the Defendant as an assignment of the benefit of the Consent to PMSA by the estate of Mr Jeffery and the J&C Company.

221. The point taken by the Claimants on this agreement was that there is no evidence that the J&C Company was actually a party to this agreement. The companies on whose behalf Mr Cohen was acting, in entering into this agreement were not identified.

222. The Claimants also made reference to an assignment dated 13th April 1981 by which Mr Cohen, as ancillary administrator of the estate of Mr Jeffery made an assignment to a company called Interlit (British Virgin Islands) Limited (**"Interlit"**) in the following terms:

"WHEREAS, Michael Jeffrey during his lifetime, entered into an agreement with Warner Brothers Records to act as producer in the production of recordings from tapes of musical performances of Jimi Hendrix, and

WHEREAS, the rights of Michael Jeffrey now belong to the Estate of Michael Jeffrey, deceased, said Estate of Michael Jeffrey for good and valuable consideration hereby assigns to Interlit (British Virgin Islands) Limited all of its right, title and interest in and to said producer's contract, and assigns to Interlit (British Virgin Islands) Limited the right to receive any and all royalties past, present or future which have not heretofore been paid to the Estate of Michael Jeffrey, deceased."

223. The Claimants' argument was that this assignment, which postdated the agreement of 26th February 1981, would have been meaningless if there had already been an

assignment of the rights held by the Jeffery estate and the J&C Company by the agreement of 26th February 1981.

224. I do not think that there is merit in either of the above arguments. Starting with the agreement of 26th February 1981 the experts in New York law were agreed that parol evidence may be used to identify who is intended to be the party to an agreement, where it is not possible to identify the relevant party from the agreement. It is common ground that Mr Cohen was an officer of the J&C Company at the time of this agreement. The J&C Company was dissolved on 18th January 1982. The filing of the certificate of dissolution was made on 28th December 1981. The certificate identified Mr Cohen as President and director of the J&C Company. In addition to this, the agreement of 26th February 1981, which was a settlement agreement, clearly embodied the settlement which PMSA had succeeded in negotiating with the Jeffery estate, which was what PMSA had agreed with Al Hendrix to do by the earlier agreement of 1st March 1974.

225. There is a letter dated 5th November 1980 from Mr Branton, attorney for PMSA, to Mr Cohen, for the Jeffery estate. In that letter Mr Branton set out his understanding of the terms of the settlement agreement which was to be entered into. The letter included the following statements (the second underlining is my own):

> *"It is the intention of your side to make an assignment of <u>all</u> rights and product owned or claimed by the estate of Jeffery <u>and its controlled entities</u> as that ownership or claim of ownership relates to any Hendrix product, even if any specific item is inadvertently left out of this agreement.*
>
> *RIGHTS GRANTED BY JEFFERY*
>
> *The rights granted by your side are as follows:*
>
> 1. *All claims or commissions, percentages, or proprietary interest in all Hendrix recordings produced before or after the date of death of Hendrix."*

226. Turning to the agreement itself of 26th February 1981 the actual assignments made by the agreement were set out in clause 13. By sub-clauses (a) and (g) the following were assigned (I have included the opening words of clause 13 in the quotation):

> *"(13) Cohen does hereby assign to PMSA all right, title and interest of Jeffrey in the following:*
>
> *(a) All right, title and interest, whether by way of percentages, commissions, or proprietary interest in all recordings of Jimi Hendrix produced before or after the death of the said Jimi Hendrix. Such assigned rights include, but are not limited to all accrued and future royalties, and all unpaid claims or audit rights from past or future audits in connection with the distribution of Hendrix recordings.*
>
> *[...]*
>
> *(g) All right, title and interest in any recorded tape or motion picture film of the performance or image of Hendrix, whether or not the same are now known to exist and wherever the name may be situated."*

227. Jeffery was defined in the agreement to mean the estate of Mr Jeffery and *"the various corporations controlled by the Estate"*.

228. Clause 20 of this agreement set out the following warranty given by Mr Cohen:

"(20) Cohen warrants that he has the right and ability to make the assignments called for in this agreement, and the authority to and is fully authorised to enter into and execute this agreement on behalf of Jeffrey and with the written consent and approval of the Estate of Jeffrey, deceased, in Great Britain and on behalf of all entities over which Jeffrey has actual control, and to thereby bind all of the aforementioned parties."

229. In my view there is sufficient in the evidence, and I so find, to establish that the J&C Company was a party to the agreement. In addition to this, it seems to me that this is established by the terms of the agreement itself. The reference in clause 20 of the agreement to all entities over which *"Jeffrey has actual control"* clearly included the J&C Company. Beyond this, it would be remarkable if the J&C Company was not a party to this agreement. The relevant terms of clause 13 of the agreement, which I have set out above, were clearly wide enough to include, and did include the benefit of whatever rights *"Jeffery"* had in the Recording Agreement. Since the reference to Jeffery included the corporations controlled by the estate of Mr Jeffery (ie. the corporations controlled by Mr Cohen as ancillary administrator of the estate), and given that Mr Chandler's rights under the Recording Agreement had previously been assigned to Mr Jeffery and the J&C Company, it would have made no sense for the J&C Company not to have been a party to this agreement. In summary it seems to me that the J&C Company can be identified as a party to this agreement, both by looking at the agreement itself and by the use of parol evidence as permitted by New York law.

230. This leaves the Claimants' reliance upon the assignment of 13th April 1981 by the estate of Mr Jeffery to Interlit. This assignment related to an agreement between Mr Jeffery and Warner Brothers Records. I cannot see on what basis it can be said that what was being assigned by this assignment corresponded to the subject matter of the agreement of 26th February 1981.

231. I therefore conclude that there is no defect in the chain of title relied upon by the Defendant, so far as the agreement of 26th February 1981 is concerned.

232. The next agreement where an issue is raised is an agreement dated 2nd November 1982 entered into between PMSA and Interlit. By clause 3 of this agreement the following property was transferred:

"(3) GRANT OF RIGHTS: For valuable consideration, receipt of which it hereby acknowledges, and subject to Interlit, fulfilling its obligation as set forth in paragraph 4 below, PMSA hereby grants to Interlit all rights and benefits acquired by PMSA from James A. Hendrix pursuant to the provisions of the agreements between James A. Hendrix and PMSA, dated February 8th, 1974 and March 1st, 1974 collectively called the "Hendrix Agreements." The Hendrix Agreements are attached hereto as Exhibits A."

233. The Claimants raised two points in respect of this agreement:
    (1) Clause 3 of the agreement only assigned rights under the agreements dated 8th February 1974 and 1st March 1974. No rights were assigned under the agreement of 26th February 1981, with the consequence that the rights which were passed to PMSA by the 1981 agreement could not have passed to Interlit by the 1982 agreement.

(2) If the rights under the Recording Agreement were included in the property assigned by clause 3 of the 1982 agreement, such assignment was ineffective because it required the consent of Al Hendrix and of Mr Redding and Mr Mitchell. Those consents were not obtained.

234. I do not think that the first of these arguments has merit. I have quoted above clause 2(b) of the agreement of 1st March 1974. By clause 2(b) of that agreement it was agreed that PMSA *"is to receive any and all rights from the Jeffery Estate which may be negotiated or result from litigation over the claims of the Jeffery Estate"*. In the event such rights were negotiated and did result from this litigation; in the form of the settlement agreement of 26th February 1981, which I have considered above.

235. If one then goes back to clause 3 of the agreement of 2nd November 1982, the property transferred was described as *"all rights and benefits acquired by PMSA from James A. Hendrix pursuant to the provisions of the agreements between James A. Hendrix and PMSA, dated February 8th, 1974 and March 1st, 1974"*. The rights and benefits referred to included the rights and benefits acquired by PMSA pursuant to the agreement of 26th February 1981, given that the rights and benefits acquired pursuant to the agreement of 26th February 1981 were acquired pursuant to the provisions of the agreement dated 1st March 1974. I therefore conclude that the benefit of the Consent was part of the property expressed to be transferred by clause 3 of the 1982 agreement.

236. This leaves the argument that the transfer was ineffective, because certain consents were required, but not obtained. I start with the position of Al Hendrix. The basis of the Claimants' argument is that clause 8 of the agreement of 1st March 1974 provided as follows:

> *"8. Either party hereto may assign all rights and obligations hereunder provided only that prior written notice shall be given to the other, and the parties shall remain expressly primarily liable at all times."*

237. On 16th April 1993 Al Hendrix commenced proceedings in Washington State, by the filing of a complaint against Mr Branton, PMSA, Interlit and other parties in relation to the Hendrix Estate. In that complaint Al Hendrix made an extensive series of allegations against Mr Branton, including the allegation that Mr Branton had failed to inform Al Hendrix of the effect of the agreement of 1st March 1974 and other agreements. Allegations of fraud were made against Mr Branton in this and other respects. In the event the proceedings commenced by this complaint were settled by a settlement agreement dated 28th July 1995. Article 4 of that settlement agreement set out a series of warranties and representations on behalf of two groups of the defendants, which were made to Al Hendrix, and which were agreed to be true and correct. These representations and warranties included the following, at article 4.20:

> *"4.20 <u>Dissolved or Defunct Affiliates.</u> Defendants Presentaciones Musicales, S.A., a Panamanian corporation ("PMSA") and Auteursrechtenmaatschappij B.V a Netherlands corporation ("ARM") have both been liquidated and dissolved and are no longer in existence; PMSA transferred all of its Rights Contracts and Rights in the Hendrix Properties to Interlit and ARM; and ARM transferred all of its Rights Contracts and Rights in the Hendrix Properties to Elber. Mr. Branton represents and warrants that the Law Corporation is now inactive and insolvent and its corporate powers, rights and privileges have been suspended, and that the Law Corporation does not hold or*

claim, and has never held or claimed, any interest of any kind in the Hendrix Properties."

238. The terms of article 4.20 seem to me to make it difficult for the Claimants now to argue that the assignment of the benefit of the Consent to Interlit was ineffective because notice of the transfer of property by clause 3 of the agreement of 2nd November 1982 had not been given to Al Hendrix. Article 4.20 seems to me to constitute an acknowledgment by Al Hendrix that the transfer was effective.

239. Beyond this, there is some evidence to support the argument that notice was given to Al Hendrix, in compliance with clause 8 of the agreement of 1st March 1974, in relation to the transfer of property effected by the agreement of 2nd November 1982. There is a letter from Mr Branton, mentioned above as attorney for PMSA, dated 11th February 1993. The letter was written by Mr Branton to Hendricks & Lewis. The letter is lengthy, but it is apparent, from what was said on page 4 of the letter, that Mr Branton acted for Al Hendrix in relation to the agreement of 1st March 1974 and, with the agreement of Al Hendrix, also acted for PMSA. It appears that Mr Branton continued to act for both parties following the agreement of 1st March 1974. In these circumstances the inference can be drawn that, as agent of both Al Hendrix and PMSA, notice of the assignment can be deemed to have been given to Al Hendrix, as well as PMSA, through the agency of Mr Branton; see Bowstead & Reynolds on Agency, at [8-205] and [8-208].

240. My attention has also been drawn to an affidavit made by Mr Branton in proceedings in New York between Maxwell Cohen, as ancillary administrator of Mr Jeffery's estate and Warner Bros Records Inc. The affidavit is dated 13th April 1999. In paragraph 5 of that affidavit Mr Branton makes reference to giving notice to Warner Bros of an assignment of rights by Mr Cohen to Interlit, which were held by Mr Cohen pursuant to an agreement with Warner Bros. I accept the Defendant's argument that this is some evidence that Mr Branton would not have neglected, in relation to the assignment of rights to Interlit by the agreement of 2nd November 1982, to give any required notice to Al Hendrix.

241. In summary, and on the available evidence, I find that notice of the transfer of property by PMSA to Interlit, by clause 3 of the agreement of 2nd November 1982, was given to Al Hendrix.

242. Finally, in relation to the position of Al Hendrix, the experts in New York law were agreed that an assignment of the benefit of the agreement of 1st March 1974 could still be effective under New York law, even if notice was not given to Al Hendrix in compliance with clause 8 of the 1974 agreement.

243. Putting all of the above analysis together, I find, on the evidence, that effective notice of the transfer of property by clause 3 of the agreement of 2nd November 1982 was given to Al Hendrix. If I am wrong in this finding, I conclude that this requirement was effectively waived by the settlement agreement of 28th July 1995. If I am wrong in both this finding and this conclusion, so that the position is that the required notice was not given and was not the subject of any waiver, I conclude that the absence of the required notice did not prevent the transfer of property by clause 3 of the agreement of 2nd November 1982 from being effective.

244. This leaves the position of Mr Redding and Mr Mitchell. The Claimants argued that the ability of the Producers to assign their rights under the Recording Agreement was limited by clause 9 of the Recording Agreement, which required that prior notice of any such assignment be given to the Artistes. The only evidence of any such notice being given was evidence that Jimi Hendrix and Mr Redding consented to the assignment of rights from Mr Chandler to Mr Jeffery, which was effected by the agreement dated 22nd October 1969. The Claimants also pointed out that the requirement to give notice of any such assignment was reinforced by Section 136 of the Law of Property Act 1925.

245. It seems to me that there are two misconceptions in this argument.

246. First, the Claimants' argument referred to the necessity to obtain consent to the assignment. It is important to be precise in one's use of language in this respect. If clause 9 of the Recording Agreement is relevant, it imposed an obligation to give notice to the Band Members. It did not require that consent be obtained to the assignment. If such notice was not given the result would not have been that the relevant assignment was of no effect. Rather, the assignment would have been effective in equity, but not at law. Indeed, this is what Section 136 of the Law of Property 1925 provides, in the case of an assignment of the benefit of a chose in action. Notice is required to be given of such an assignment. If notice is not given, the assignment takes effect in equity only.

247. Second, the Claimants' argument assumes that the ability of the Producers to assign their rights under the Recording Agreement was governed by clause 9 of the Recording Agreement. This seems to me to be wrong for three reasons. First, the rights of assignment in clause 9 of the Recording Agreement were limited to the duration of the Recording Agreement. As such, I do not see that they could be relied upon for the assignment of rights after the term of the Recording Agreement had come to an end. Second, it seems to me that clause 9 of the Recording Agreement, given its limitation to the duration of the Recording Agreement, was not concerned with general rights of assignment under the Recording Agreement, but rather with the assignment of rights which only took effect during the term of the Recording Agreement, of which the most obvious example would be the services of the Band Members. Third, and at least so far as the rights vested in the Producers by clause 6 of the Recording Agreement were concerned, the Producers were given an unqualified right of assignment by clause 6(v). Independent of this, and even if I am wrong in my construction of clause 6(v), the Recording Agreement did not contain any provision which prevented the assignment of the rights of the Producers under the Recording Agreement, save for the requirement of notice in clause 9. Clause 9 was however limited in its scope, as I have explained. As such, it seems to me that the Producers were entitled to assign their rights under the Recording Agreement and, save where clause 9 applied, there was no express requirement for notice to be given of such assignment, and no other restriction on such assignment.

248. In summary, and so far as the position of Mr Redding and Mr Mitchell was concerned, it seems to me that the most which can be said is that the benefit of the Consent was a chose in action. As such it seems to me that assignment of the benefit of the Consent was subject to Section 136 of the Law of Property Act 1925. A failure to give notice of the assignment of the benefit of the Consent would not however, as I have explained, have resulted in the assignment of the benefit of the Consent being of no effect. It would still

have been effective in equity. So far as New York law is concerned, the position is equivalent, in the sense that an assignment made without notice can still be effective.

249. In these circumstances I cannot see any basis for saying that the transfer of the benefit of the Consent, which would otherwise have been achieved by clause 3 of the agreement of 2nd November 1982, was rendered of no effect by the reason of the absence of the consent of Mr Redding or Mr Mitchell.

250. I therefore conclude that there is no defect in the chain of title relied upon by the Defendant, so far as the agreement of 2nd November 1982 is concerned.

251. This leaves the instrument of assignment of 11th August 1995, by which Interlit and various other parties assigned rights to Experience. It is not in dispute that this assignment agreement was effective to transfer such rights as Interlit held in respect of the Recordings and the Performances to Experience. It therefore follows that if, as I have decided, the previous agreements relied upon by the Defendant for their chain of title were effective to pass the benefit of the Consent to Interlit, the benefit of the Consent then made its way to the Defendant, by the assignment agreement to Experience, the licence to SME, and the sub-licence to the Defendant. Nevertheless, it seems to me that this assignment agreement is relevant for a separate reason.

252. What I am referring to as the instrument of assignment of 11th August 1995 was an assignment made by Interlit and others. There was also an assignment made by Al Hendrix to Experience, made by an instrument of assignment also dated 11th August 1995.

253. These assignments were made pursuant to a settlement agreement of 28th July 1995 which was entered into between Al Hendrix and a number of parties, including Mr Branton, and Interlit. The purpose of the settlement agreement was to settle the dispute between the parties in relation to rights and claims over the assets and properties defined in the settlement agreement as the Hendrix Properties. The Hendrix Properties were very broadly defined, in terms wide enough to include rights in the Recordings and the Performances. Article 1.4 of the settlement agreement provided as follows:

> *"1.4 Creation of the Company. Plaintiff shall form one or more companies (collectively, the "Company") in anticipation of Plaintiff's and the Defendants' transfer to the Company of rights in and/or claims to the Hendrix Properties."*

254. The evidence of the documents is that the new company which was formed pursuant to article 1.4 was Experience. Effect was given to the intended assignments referred to in article 1.4 by the instruments of assignment which I have mentioned. The rights assigned by these instruments of assignment were broadly defined, and included all copyrights in *"all sound or audio recordings and compilations thereof, whether mastered or unmastered, and regardless of form, embodying the performances and compositions of Artist;"*. The *"Artist"* was defined as Jimi Hendrix.

255. The relevance of the instrument of assignment between Interlit and Experience is that it was part of a comprehensive settlement whereby very broadly defined property passed into the ownership of Experience from various parties who included Al Hendrix. In these circumstances, if any rights in the Recordings and the Performances remained in the hands of Al Hendrix, on the basis of the arguments raised by the Claimants in relation to

the chain of title, it is difficult to see how these problems, if they had existed, were not cured, as between Al Hendrix and Experience, by the settlement agreement and consequential instrument of assignment entered into by Al Hendrix.

256. Drawing together all of the analysis in this section of the judgment, I conclude that Experience was the successor to the benefit of consents given by the Recording Agreement. In particular, I conclude that Experience was the successor to the benefit of the Consent. It follows that the benefit of the Consent is now vested in the Defendant, by virtue of the licence granted to the SME, and the sub-licence granted to the Defendant.

<u>If any consents were given by the Recording Agreement, were those consents arrangements and/or agreements within the meaning of the Transitional Provisions?</u>

257. I have decided that a consent was given by the Recording Agreement; namely the Consent. By the Consent Mr Redding and Mr Mitchell consented, for the benefit of the Producers, to the exploitation of the Performances in sufficiently wide terms to avoid infringement of any of the rights contained within the PPRs. The Consent was not limited in time, and was not limited to any particular methods for the delivery of music. I have also decided that the benefit of the Consent was capable of assignment and has been assigned to the Defendant by the chain of title which I have considered in the previous section of this judgment.

258. I should start by identifying the specific Transitional Provisions which are engaged by this issue. Section 180(3) of the 1988 Act provides as follows:

> *"(3) The rights conferred by this Part apply in relation to performances taking place before the commencement of this Part; but no act done before commencement, or in pursuance of arrangements made before commencement, shall be regarded as infringing those rights."*

259. As I have explained earlier in this judgment, the performers' property rights which I am referring to as the PPRs were not introduced by the 1988 Act, but by the 1996 Regulations and the 2003 Regulations. The rights which comprise the PPRs were however added to Part II of the 1988 Act, and thus form part of the rights conferred by Part II of the 1988 Act, as referred to in Section 180(3). The transitional provisions in Section 180(3) thus apply to the PPRs.

260. The equivalent provision in the 1996 Regulations is Regulation 27, which provides as follows:

> *"(1) Except as otherwise expressly provided, nothing in these Regulations affects an agreement made before 19th November 1992.*
>
> *(2) No act done in pursuance of any such agreement after commencement shall be regarded as an infringement of any new right."*

261. A new right is defined in Regulation 25(3) in the following terms:

> *"(3) In this Part a "new right" means a right arising by virtue of these Regulations, in relation to a copyright work or a qualifying performance, to authorise or prohibit an act. The expression does not include-*
>
> *(a) a right corresponding to a right which existed immediately before commencement, or*
>
> *(b) a right to remuneration arising by virtue of these Regulations."*

262. The equivalent provision in the 2003 Regulations is Regulation 32:

> *"(1) Nothing in these Regulations affects any agreement made before 22nd December 2002.*
>
> *(2) No act done after commencement, in pursuance of an agreement made before 22nd December 2002, shall be regarded as an infringement of any new or extended right arising by virtue of these Regulations."*

263. The 2003 Regulations do not contain a definition of *"new or extended right"*.

264. It will be noted that Section 180(3) refers to *"arrangements"*, while Regulation 27 and Regulation 32 refer to *"any agreement"*. For the purposes of this judgment, I do not think that this difference in language matters. The Consent was granted by the Recording Agreement, and constitutes an agreement, made between the Band Members and the Producers, as part of the Recording Agreement. As such, it seems to me that the Consent constitutes an agreement for the purposes of Regulation 27 and Regulation 32. The reference to *"arrangements"* in Section 180(3) seems to me to be capable of a wider meaning, but on any view of the matter, it also seems to me that the reference must be capable of including an agreement such as the Consent.

265. I am bound to say that the effect of these saving provisions seems clear to me. Subject to the argument based upon Regulation 31 of the 1996 Regulations, which I still have to consider, I found the quantity of argument which I received on the Transitional Provisions, at the outset of the Trial, somewhat baffling. As is often the case, the arguments were refined over the course of the Trial, and became clearer in the closing submissions. There was however, as it seemed to me, a failure to maintain a consistent separation, in the submissions, between (i) the question of whether Recording Agreement contained a consent wide enough to avoid infringement of the PPRs, which engaged issues of the construction of the Recording Agreement, the nature of the consent required, and whether the Defendant could show a valid chain of title to the benefit of any such consent, and (ii) the effect of the Transitional Provisions.

266. In any event, in the case of the performers' rights introduced by the 1988 Act and the subsequent Regulations, the intention of the relevant saving provisions was, it seems to me, to ensure that the introduction of these performers' rights was not unfairly retrospective. Section 180(3) provides that performers' rights apply in relation to performances taking place before the introduction of the relevant performers' rights. This therefore had the potential to apply to the exploitation of performances prior to the introduction of the relevant performers' rights. This result is however avoided by the stipulation in Section 180(3) that no act done before commencement of Part II of the 1988 Act does constitute an infringement of the relevant performers' rights. Turning to the position after commencement, Section 180(3) preserves the effect of pre-existing agreements and pre-existing arrangements. If therefore a person exploiting a performance, after commencement of the relevant performers' rights, can point to a pre-existing agreement or arrangement, predating commencement of the relevant performers' rights, which is sufficiently wide to permit exploitation of the performance without infringing the relevant performers' rights, the saving provisions preserve the effect of that agreement or arrangement. The pre-commencement agreement or arrangement, provided that it is sufficiently widely expressed, can still be relied upon. In the present case I have decided that the Defendant can point to such an agreement or arrangement; namely the Consent.

267. The analysis of the relevant Transitional Provisions, as set out in my previous paragraph also appears to me to be consistent with what was said by Arnold LJ in his judgment in the Court of Appeal in relation to the strike out application. I have already explained, in the narrative section of this judgment, the circumstances in which the appeal to the Court of Appeal came about. As I have explained, the first ground of appeal was that Michael Green J had been wrong to reject the Defendant's contention that the PPR Claim was precluded by the Transitional Provisions. Arnold LJ rejected this argument, for the reasons which he gave in his judgment, at [32]-[43]. My analysis appears to me to be consistent with Arnold LJ's explanation of the operation of Section 180(3) in the relevant part of his judgment. I note, in particular, the second and third reasons which Arnold LJ gave in his judgment, at [42] and [43], for rejecting what was then the Defendant's argument that it did not need to demonstrate, by demonstrating a chain of title, that it had the benefit of any contractual consent to its allegedly infringing acts:

> *"42. Secondly, a party who is in a position to rely upon consent given by the performer in question does not need to rely on section 180(3). Where consent is relied upon, the ambit of the consent is critical. It would be very odd if section 180(3) could be relied upon to circumvent the limits on any consent given by the performer. Yet the effect of Sony's argument is that the ambit of the performer's consent is immaterial. In saying this, I am not intending to exclude the application of section 180(3) in some circumstances (such as the example of a distributor of illicit recordings postulated in Performers' Rights at 5-108).*
>
> *43. Thirdly, section 180(3) has nothing to do with exhaustion of rights. If a performer's rights have been exhausted on ordinary principles (for example, a performer's reproduction and distribution rights will be exhausted in relation to a particular CD whose manufacture and sale the performer has consented to), section 180(3) is not required. If the performer's rights have not been exhausted on ordinary principles (for example, the performer's making available right, which is not exhausted by a previous making available of the same recording of the same performance), section 180(3) does not provide for exhaustion."*

268. I have already dealt with the Claimants' argument, based upon EU authorities, that the burden was on the Defendant to establish that a sufficiently wide consent had been given in the Recording Agreement to avoid infringement of the PPRs; see the earlier section of this judgment where I have dealt with the meaning and effect of the Recording Agreement, in relation to the PPRs. I have concluded that this burden has been discharged. I repeat this conclusion at this stage only because the issue of the nature of the consent required found its way into the submissions on the Transitional Provisions.

269. I therefore conclude that the Consent did constitute an agreement and an arrangement within the meaning of the relevant Transitional Provisions.

<u>If any consents were given by the Recording Agreement which were arrangements and/or agreements within the meaning of the Transitional Provisions, were the Defendant's acts of alleged infringement done pursuant to those arrangements and/or agreements?</u>

270. I can take this issue very shortly. The alleged infringements are based upon the Defendant's exploitation of the Recordings and the Performances. The Defendant has however, as I have decided, the benefit of the Consent.

271. It is clear that, for the purposes of demonstrating that the relevant acts of the alleged infringing party have been carried out in pursuance of an agreement or arrangement, a nexus needs to be demonstrated between the alleged infringing acts and the relevant agreement or arrangement relied upon. This was explained in the following terms by Arnold LJ, in his judgment in the Court of Appeal at [41], when giving the first of his three reasons for rejecting the Defendant's argument that Section 180(3) provided a defence to the PPR Claim, without the need to demonstrate any chain of title to the relevant consent. I have already quoted the second and third reasons, in the previous section of this judgment. The first reason was as follows:

> *"41. I cannot accept this argument for the following reasons. First, the words "in pursuance of" plainly require some nexus between the allegedly infringing acts and the "arrangements" relied upon. On Sony's argument no nexus at all would be required. The party committing the allegedly infringing acts could be a complete stranger to the arrangements in question (as indeed, on Sony's pleaded case, Sony is). This would eviscerate the rights conferred by Part II of the 1988 Act."*

272. It is important to understand, in this context, that prior to the decision of the Court of Appeal in this case, the Defendant had not pleaded any chain of title, either in respect of the benefit of any consent said to exist under the Recording Agreement which permitted the exploitation of the Recordings and the Performances or in respect of the benefit of the Releases or the Discontinuances, if they had any effect upon the Claims. The Defendant's position was that it did not need to plead such chain of title. Following the decision of the Court of Appeal the Defendant applied for permission to amend its Defence, in order to plead chain of title. The application to amend was opposed, but I granted permission to amend at a hearing on 9th July 2025. In my judgment on the amendment application I accepted the Defendant's evidence that the decision to amend in order to plead chain of title had been made following the decision of the Court of Appeal. This, in turn, reflected the fact that it was clear from the judgment of Arnold LJ that the Defendant did need to plead and prove a chain of title in respect of the benefit of whatever rights it claimed to derive from the Recording Agreement and/or the Releases and/or the Discontinuances.

273. The Defendant has now established the required chain of title, in relation to the Consent, between the Producers and itself; see my decision on this issue earlier in this judgment. Accordingly, it seems to me that the Defendant has established the required nexus between the acts of alleged infringement of the PPRs and the Consent, so that its exploitation of the Performances can be said to have been carried out *"in pursuance of"* the Consent.

274. In these circumstances I conclude that the Defendant's acts of alleged infringement of the PPRs have been carried out pursuant to the agreement and arrangement constituted by the Consent.

Is the PPR Claim precluded by virtue of the PPRs being vested in the Producers or their successors in relation to the Recording Agreement pursuant to Regulation 31 of the 1996 Regulations?

275. It follows from my answers to the previous two issues that the Defendant does not need to argue its case further on the Transitional Provisions. The Defendant can rely upon the

Consent, by way of answer to the PPR Claim. All that the Transitional Provisions do, by the relevant saving provisions which I have quoted above, is to confirm the ability of the Defendant to rely upon the Consent, notwithstanding that the Consent predates the introduction of the PPRs. The important point is that the saving provisions within the Transitional Provisions do not, in and of themselves, create or render effective the Consent. As I construe the saving provisions, they simply confirm the continuing validity of the Consent. If I had concluded that the Consent was not sufficiently wide to permit the acts which are said to constitute infringement of the PPRs, the saving provisions in the Transitional Provisions would not have been capable of changing this position.

276. In its argument based on Regulation 31 of the 1996 Regulations the Defendant seeks to go further than this position. The Defendant seeks to argue that Regulation 31 had the effect of vesting, in the successors of the Producers, the right to make copies of the recordings of the Performances; that is to say copies of the Recordings. On this argument, as I understood it, the PPRs did not vest Mr Redding (or his estate/heir) or Mr Mitchell when they were introduced, at least in respect of the right to make further copies of the Recordings.

277. It will be seen that the Defendant does not need to rely upon this additional argument, in order to meet the PPR Claim. I have concluded that the Defendant can rely on the Consent, without having to resort to this additional argument. As however the Regulation 31 argument was addressed by the parties at some length in their written and oral submissions, I will set out my decision on this argument.

278. Regulation 31 provides as follows:

> *"Where before commencement-*
>
> *(a) the owner or prospective owner of copyright in a literary, dramatic, musical or artistic work has authorised a person to make a copy of the work, or*
>
> *(b) the owner or prospective owner of performers' rights in a performance has authorised a person to make a copy of a recording of the performance,*
>
> *any new right in relation to that copy shall vest on commencement in the person so authorised, subject to any agreement to the contrary."*

279. The argument of the Defendant in relation to Regulation 31, as I understood it, runs as follows:

(1) By the Recording Agreement Mr Redding and Mr Mitchell authorised the Producers to make a copy of the Recordings, that is to say recordings of the Performances in which Mr Redding and Mr Mitchell participated, within the meaning of Regulation 31(b).

(2) Any new right in relation to that copy, such as a performers' property right, therefore vests, on commencement of the 1996 Regulations, in the person so authorised, subject to any agreement to the contrary.

(3) Thus, any performers' property rights in the copies of the Recordings authorised to be made pursuant to the Recording Agreement vested not in Mr Redding or Mr Mitchell, but in the Producers.

(4) This was subject to any agreement to the contrary. The Recording Agreement permitted the Producers to authorise others to exercise their rights under the Recording Agreement or to assign their rights to third parties. As such, the PPRs in all copies of the Performances which were authorised by the Recording

Agreement vest in the successors in title of the Producers; that is to say the Hendrix Estate and, ultimately, Experience.

280. The argument has this limitation. As Mr Johnson pointed out, in his oral closing submissions, there is no provision equivalent to Regulation 31 of the 1996 Regulations in the 2003 Regulations. As such, Mr Johnson submitted that the Defendant's argument based on Regulation 31, even if correct, did not apply to the making available right introduced by the 2003 Regulations. I understood Mr Howe, in the course of his oral closing submissions, to accept this limitation.

281. The Claimants' argument was that Regulation 31 has a far narrower meaning. Their argument was that Regulation 31 was dealing only with copies of recordings of performances in existence at the time when the new rights created by the 1996 Regulations were brought into force. If the making of the relevant copy had been authorised by the owner or prospective owner of performers' rights in the relevant performance, any new right coming into existence pursuant to the 1996 Regulations would, on commencement (1st December 1996), vest in that person. This would allow the relevant person to continue to deal with that copy, without being inhibited by the new rights. What Regulation 31 did not permit was the making of further copies from that copy. The vesting applied to that copy only. The Claimants also argued that the copy in question had to be a tangible, physical copy, as opposed to a digital copy. The Claimants also argued that a person seeking to rely upon Regulation 31 was required to identify the relevant copy in respect of which it was said that any new rights had vested in the person previously authorised to make that copy.

282. In terms of academic commentary, there is support for the Claimants' narrow construction of Regulation 31 in Laddie, Prescott & Vitoria: The Modern Law of Copyright, at [27-103] (omitting footnotes):

> *"**27.103** The performer is entitled to the new rights (ie the property rights) unless he had died before 1 December 1996, in which case the person who was entitled to exercise the non-property performers' rights is entitled, but if this is the performer's personal representative any damages he recovers by virtue of the property rights devolve as part of the performer's estate notwithstanding the fact that they did not vest in him on the performer's death. However, where the owner or prospective owner of a performers' right had authorised another to make a copy of a recording of the performance before 1 December 1996, the new rights in relation to that copy only vest in the person authorised. This allows the authorised person to distribute, rent or lend the copy without infringing. It would not allow him to make further copies because they would be indirect copies of the original recording and therefore an infringement of the new reproduction right in respect of that recording."*

283. Further support for the Claimants' argument can be found in Performers' Rights, at 3-03, where Sir Richard Arnold, writing extra-judicially, explains the effect of Regulation 31 in the following terms (footnotes omitted):

> *"Where the owner or prospective owner of performers' rights in a performance authorised a person to make a copy of a recording of that performance before commencement of the 1996 Regulations, any new right in relation to that copy vests in that person on commencement unless there is an agreement to the contrary. In Experience Hendrix LLC v Purple Haze Ltd Hart J left open the question whether*

the copy must have been made before commencement. It is submitted that the answer to this question is clearly yes. The words "in relation to that copy" mean that this exception is very narrow indeed. Thus it does not entitle the beneficiary to make or distribute new copies of the recording."

284. In terms of case law I was not referred to any case in which the construction of Regulation 31 had been the subject of judicial decision. Regulation 31 was mentioned by Hart J in his judgment in *Experience Hendrix LLC v Purple Haze Records Ltd* [2005] EWHC 249 (Ch), at [34], in the context of an argument based on Regulation 31. The argument failed however on the basis that there had been no authorisation within the meaning of Regulation 31. This rendered it unnecessary for Hart J to decide:

> *"the interesting questions which were argued before me, first, as to whether the reproduction right was a ''new right'' for Regulation 31 purposes as opposed simply to a right ''corresponding'' to the original s.183 right (see the definition in reg.25(3)), and, secondly, as to whether the copies referred to in reg.31 are restricted to copies made before commencement."*

285. I was also referred to the judgment of Master Kaye in *Tyburn Film Productions Limited v Broughton* [2023] EWHC 3247 (Ch). The case was concerned with a dispute over the right to *"resurrect"* the well-known actor, Peter Cushing, who died in 1994. Peter Cushing appeared in the original Star Wars film in 1977. In respect of that appearance an agreement was entered into, in 1976, between Peter Cushing's production company and Star Wars Productions Limited. Peter Cushing, or more accurately his image, was then resurrected, using the appropriate technology, for the purposes of his original Star Wars character appearing in a subsequent Star Wars film, Rogue One, in 2016. The claimant company's case was that, by virtue of an agreement which it had made with Peter Cushing and his production company, shortly before his death, its consent was required for this use of Peter Cushing's original performance. On this basis the claimant made various claims against the defendants arising out of what it claimed was a breach of this agreement.

286. The fourth and fifth defendants applied for an order striking out the claim against them or for summary determination of the claim. For the reasons explained in her judgment, the Master concluded that the issues raised by the claim were not suitable for summary determination, and declined to grant the application. For present purposes the case is relevant because the fourth and fifth defendants argued that the 1976 agreement had authorised Star Wars Productions Limited to make a copy of the recording of Peter Cushing's performance. On this basis the fourth and fifth defendants argued that Regulation 31 had vested in Star Wars Productions Limited the rights required to restore Peter Cushing's character in the later film. In concluding that this argument was not suitable for summary determination, the Master did offer the following observations in her judgment, at [38], which I find helpful:

> *"38.It seems to me that Regulation 31 includes some very specific wording. For example, the use of definite article "the" coupled with the use of relative pronouns such as "that" for example "that copy" must mean something. Copinger does not unpack this but both Arnold and Laddie on analysis say it creates a very narrow exception in relation to the performance rights limited to the copy. That would not assist Mr Hill. For Mr Hill, a wider interpretation of Regulation 31 appears to be necessary. Whilst Mr Moody-Stuart accepted that the very narrow approach adopted by Arnold LJ may be too narrow, he did not accept that the decision was*

binary and that it was either the Copinger approach or the Arnold approach. It seems to me that whatever the ultimate position, the use of the definitive article and the relative pronouns suggests some intended limitation on the scope of the regulation. I am bound to conclude that the precise scope of Regulation 31 is not suitable for summary determination. It is not an appropriate issue on which to grasp the nettle. It seems to me that given the competing texts and my view on the wording of Regulation 31, some limitation is intended, and it is a point that would benefit from proper consideration based on actual facts and considered argument as to its scope and context in that context."

287. Subject to the question of whether the Claimants are right to say that Regulation 31 applies to tangible copies of recordings only, to which I shall come, it is my view that the narrow construction of Regulation 31 contended for by the Claimants is to be preferred. I say this for the following reasons.

288. First, there is the language of Regulation 31. As the Master noted in her judgment in *Tyburn*, the wording of Regulation 31 is very specific. So far as sub-paragraph (b) is concerned, one starts with *"a copy of a recording of the performance"*. One then proceeds to consider whether any new right has arisen *"in relation to that copy"*. The reference is a specific reference to *"that copy"*. The effect of this wording seems to me to be as follows:
    (1) The relevant copy of the relevant recording of the relevant performance must be in existence and must have been authorised prior to the creation of the relevant new right. This is clear from the opening words of Regulation 31, which refer to the period *"before commencement"*, and also from the use of the past tense in sub-paragraph (b).
    (2) Where these conditions are satisfied, and there is a pre-existing copy of the relevant recording, the new right is only vested in the relevant person in relation to that pre-existing copy. There is no vesting of the new right in the relevant person in relation to further copies of that copy. If Regulation 31 had intended this result, it seems to me that it would have spelt this out by an express reference to *"that copy and any further copies"*, or some similar form of expanded wording. There is however no such expanded wording in the last part of Regulation 31.

289. Second, there is the support for this construction offered by the authors of the commentary in Laddie, Prescott & Vitoria and Arnold. I would require considerable persuasion that both of these commentaries are wrong. The Defendant's counsel offered a variety of arguments, in their skeleton argument for the Trial, as to why these commentaries were too narrowly expressed. I do not regard it as necessary to go through these arguments individually. I was not persuaded by any of these arguments, essentially because they seemed to me to disregard the very particular wording of Regulation 31, while the commentaries reflect that wording. I respectfully agree with both commentaries.

290. Third, it strikes as implausible that Regulation 31 was effectively intended to confer on a person the right to make infinite further copies of a recording of a performance, in circumstances where the relevant person had been authorised only to make a copy of the relevant recording of the performance, prior to the introduction of the new right. This would amount to an expansion of the previous authority, and a significant reduction of

the benefit of the new right to the relevant performer. This seems to me to be contrary to what the introduction of performers' rights was intended to achieve.

291. I understood the Defendant also to argue that, because there is reference to *"agreement to the contrary"* in Regulation 31, the Recording Agreement could be relied upon as agreement to the contrary; meaning that the PPRs, so far as created by the 1996 Regulations, could be treated as vesting those PPRs in the Producers and their successors in title. If I have understood this argument correctly, I do not think that it works. The reference to agreement to the contrary in Regulation 31 seems to me to be a reference to an agreement which has the effect of negating what would otherwise be the vesting effect of Regulation 31. In a case such as the present case where, in my view, Regulation 31 does not have a vesting effect, I do not think that an agreement such as the Recording Agreement can be relied upon to give Regulation 31 a vesting effect it would not otherwise have.

292. For the reasons which I have explained, the Defendant does not need to rely on Regulation 31, in partial answer to the PPR Claim. The Consent provides a complete answer to the PPR Claim. On the basis of my analysis above however, I conclude that the Defendant is wrong in its construction of Regulation 31. Subject to the question of whether the Claimants are right to contend that Regulation 31 applies only to tangible copies, I conclude that the narrow construction of Regulation 31 contended for by the Claimants is correct. I therefore conclude that Regulation 31 did not, in the present case, have the effect of vesting any of the PPRs introduced by the 1996 Regulations in any party or parties other than Mr Redding and Mr Mitchell.

293. It follows that the PPR Claim is not precluded by virtue of the PPRs being vested in the Producers, or their successors in relation to the Recording Agreement, pursuant to Regulation 31 of the 1996 Regulations.

294. I did indicate that I would come back to the question of whether Regulation 31 applies to tangible copies only. It will be appreciated that this question is effectively academic, given my decision on the narrow scope of Regulation 31. I did however have the benefit of some quite detailed written and oral submissions from the Defendant's counsel on this point. In deference to those submissions I will briefly state my conclusion on this question.

295. In my view Regulation 31 does apply to both tangible and intangible copies of recordings. I say this for the following reason.

296. In this context I was referred to the judgment of Joanna Smith J in *Getty Images (US) Inc v Stability AI Limited* [2025] EWHC 2863 (Ch). In her judgment, at [563], the judge made reference to the well-established principle that, in general, a statute is always speaking. The principle was explained by Lord Hamblin and Lord Burrows JJSC in their joint judgment in *News Corp UK & Ireland Ltd v Commissioners for His Majesty's Revenue and Customs* [2023] UKSC 7 [2024] AC 89, at [29]:

> *"29 What is meant by the always speaking principle is that, as a general rule, a statute should be interpreted taking into account changes that have occurred since the statute was enacted. Those changes may include, for example, technological developments, changes in scientific understanding, changes in social attitudes and changes in the law. Very importantly it does not matter that those changes could*

not have been reasonably contemplated or foreseen at the time that the provision was enacted. Exceptionally, the always speaking principle will not be applied where it is clear, from the words used in the light of their context and purpose, that the provision is tied to an historic or frozen interpretation. A possible example (referred to by Lord Steyn in R v Ireland at [1998] AC 147, 158) is The Longford (1889) 14 PD 34 where the word "action" in a statute was held not to be apt to cover an Admiralty action in rem: at the time the statute was passed, the Admiralty Court "was not one of His Majesty's Courts of Law" (p 37)."

297. It seems to me that this principle can be applied to the construction of Regulation 31. Consistent with this principle, Regulation 31 should be seen as capable of applying to new methods of copying, such as digital copying.

298. This is borne out by actual decision in *Getty Images*. The relevant issue which the judge had to decide was whether an infringing copy, within the meaning of the 1988 Act, was limited to a tangible article, or extended to an intangible article. For the reasons set out in her judgment, at [565]-[591], Joanna Smith J decided that an electronic copy stored in an intangible medium was capable of being an infringing copy and an article for the purposes of the 1988 Act. So far as the application of the always speaking principle was concerned, the judge said this, at [580]:

> *"580. I agree with Getty Images that the "always speaking principle" is of assistance in these circumstances. Stability does not suggest that the statute was intended to be "frozen" in time and I consider that modern storage methods in intangible media amount to a fresh set of facts which fall within the same genus of facts as those to which the original expressed policy has been formulated. The fresh set of facts arises by reason of the prevalence in the modern world of intangible electronic storage which has been brought about by enormous strides in technology since the date of commencement of the CDPA. The purpose of the Act – the protection of copyright owners – would, in my judgment, be fulfilled by an interpretation which encompassed modern technology."*

299. It seems to me that this reasoning can also be applied in the present case. Although, as I have decided, Regulation 31 is limited in its scope, I can see no reason why the reference to a copy in Regulation 31 should not include an intangible copy, in addition to a tangible copy.

300. Further support for this analysis can be found in Section 182A of the 1988 Act, which contains one of the PPRs relied upon in the PPR Claim; namely the need for the consent of the performer when making a copy of a recording of the whole or any substantial part of a qualifying performance. The Defendant is alleged to have infringed this PPR. The allegation of infringement is not, of course, confined to the making of physical copies of the Recordings, but includes modern methods for the delivery of the music of JHE contained in the Recordings. Subsection (1A) provides that the reference to making a copy of a recording *"includes making a copy which is transient or is incidental to some other use of the original recording"*. The inclusion of a *"transient"* copy would appear to include the making of an electronic, non-tangible copy of a recording. Given the breadth of this definition, it would be odd, and apparently inconsistent, if the scope of Regulation 31 was limited to tangible copies of recordings.

301. I can see the point that, on the basis of the narrow construction of Regulation 31 which I prefer, one might expect the scope of Regulation 31 effectively to be confined to physical copies of recordings of performances, such as CDs or audio cassettes, which were held by persons at the time when the 1996 Regulations came into force. This however seems to me to be a different point. The fact that one might have expected Regulation 31 to be confined to tangible copies does not seem to me to preclude Regulation 31 applying to intangible copies, if and to the extent that the same existed at the date of commencement of the 1996 Regulations.

302. The question of whether Regulation 31 is capable of applying to intangible copies is, as I have said, an academic question in the present case, given the narrow construction of Regulation 31 which I have preferred. That said, it seems to me that Regulation 31, notwithstanding its very limited scope, is capable of applying to tangible copies of recordings of performances and intangible copies.

Is the PPR Claim precluded by the Recording Agreement and/or the Transitional Provisions?

303. The answer to this issue follows from my previous analysis of the PPR Claim. For the reasons which I have given, the PPR Claim is precluded by the Recording Agreement. Specifically, the PPR Claim is precluded by the Consent, of which the Defendant has the benefit.

304. So far as it matters, I do not think that it is correct to say that the PPR Claim is precluded by the Transitional Provisions. For the reasons which I have given, the Transitional Provisions have not had the effect, in and of themselves, of precluding the PPR Claim. Rather, the Transitional Provisions have preserved the effect of the Consent, as an answer to the PPR Claim.

305. Drawing together all of my analysis of the PPR Claim, it follows that the PPR Claim fails. The Defendant is entitled to rely upon the Consent as an answer to the PPR Claim. The PPR Claim thus falls to be dismissed.

The Redding Release and the Redding Discontinuance

306. I have already concluded that the Claims fail, and fall to be dismissed, without the necessity of having to consider the effect of the Releases and the Discontinuances. Strictly speaking therefore, the effect of the Releases and the Discontinuances does not arise for decision. I have however heard two days of expert evidence on New York law, in respect of which I have already provided my overall assessment of the experts. In addition to this, I have received the extensive written and oral submissions of the parties on the effect of the Releases and the Discontinuances. If this case was to go on appeal, there might be a need for findings on the expert evidence. Finally, if the Defendant is right in its case on the Releases and/or the Discontinuances, they provide a free-standing defence to the Claims. Putting all of this together, and in deference to the work of the parties and the experts in relation to this part of the case, I consider that I should decide what effect, if any, the Releases and the Discontinuances have in relation to the Claims.

307. I start by setting out the terms of the Redding Release and the Redding Discontinuance.

308. The recitals to the Redding Release provided as follows:

"WHEREAS, I, NOEL REDDING, previously performed as a professional musician as a part of a group known professionally as "ARE YOU EXPERIENCED", in which said JIMI HENDRIX was the lead performer, and
WHEREAS, said performances consisted of personal appearances, recording sessions, personal appearance performances which were recorded, and personal appearance performances which were filmed, and
WHEREAS, I have heretofore made certain claims and filed certain lawsuits against the Estate of JIMI HENDRIX, deceased, in the City of New York, State of New York, United States of America, and against Warners Brothers Records in Los Angeles, California, United States of America, and I have further made certain claims against Warner Brothers Pictures arising out of its intended use of my sound and likeness in a proposed documentary film on the life of Jimi Hendrix, and
WHEREAS, it is my desire to settle all of the said claims. I ,therefore, for myself, my heirs, executors and administrators, in consideration of the sum of One Hundred Thousand ($100,000.00) Dollars to me paid by the Estate of JIMI HENDRIX, deceased, the receipt of which is hereby acknowledged, do by this instrument agree as follows:"

309. Clause 1 of the Redding Release contained, as they were expressed, the following release and covenant not to sue:

> *"1. I hereby release the Estate of JIMI HENDRIX, deceased, "ARE YOU EXPERIENCED", a corporation, the stock of which is owned by the Estate of JIMI HENDRIX, deceased, Warner Brothers Records, and any and all other record companies throughout the world with whom JIMI HENDRIX in his lifetime, or the Estate of JIMI HENDRIX, deceased, have entered into contracts or agreements for the distribution and sale of recordings of JIMI HENDRIX on which I performed, from any and all liability or responsibility to me to account for any royalities or compensation to me in connection with said recordings. I further covenant not to sue any such record companies for compensation arising out of distribution of such recordings. By this release I acknowledge full settlement of any compensation which I may claim in connection with earnings on said recordings in the past, as well as any earnings which might result in the future, both in the United States and throughout the rest of the world."*

310. Clause 2 contained a further set of provisions comprising, as they were expressed, the following release, assignment and covenant.

> *"2. I hereby release the Estate of JIMI HENDRIX, deceased, and Warner Brothers Pictures from any and all claims which I may have for their use of my likeness and sound in connection with the motion picture on the life of JIMI HENDRIX currently in production by Warner Brothers Pictures, including any sound track recordings from said film. I hereby assign to the Estate of JIMI HENDRIX, deceased, all right to grant consent for the use of my likeness and sound which may have been filmed and recorded at any time in connection with my performance as a part of the ARE YOU EXPERIENCED group in conjunction with the performance of JIMI HENDRIX. I further covenant with the Estate of JIMI HENDRIX, deceased, forever to refrain from instituting or in any way aiding any claim, demand, action or cause of action for damages, expense or compensation against said*

estate in connection with my performance or performances in connection with the ARE YOU EXPERIENCED group."

311. Clauses 3 and 4 provided as follows:

"3. This release goes to any recordings which may be released or mastered in the future as well as those already in release and goes to world-wide rights.

4. I further agreed that my attorneys are instructed to enter dismissals with prejudice and stipulations for discontinuance of any and all actions which I have heretofore caused to be filed in any court in any jurisdiction of the world."

312. It will be noted that the provisions of the Redding Release used the wrong name (*"Are You Experienced"*) for JHE. It was however common ground between the experts that the reference to *"Are You Experienced"* should be interpreted as references to JHE.

313. As explained in the narrative section of this judgment, the Redding Release was signed by Mr Redding, and also by Mr Shapiro, attorney for Mr Redding in the Historical New York Claims, recording his approval of the terms of the Redding Release.

314. Finally, beneath the signatures on the Redding Release, the following qualification appeared:

"Nothing contained herein shall in any way be deemed a waiver of or with prejudice to my claim and/or claims as against Yameta Corporation, a Bahamian Corporation, or its successors in interest assignees or its officers and directors."

315. Turning to the Redding Discontinuance, I have already set out the terms of the discontinuance, which I repeat for ease of reference:

"IT IS HEREBY STIPULATED AND AGREED, by and between COVINGTON, HOWARD, HAGOOD & HOLLAND, ESQS, as attorneys for the Defendant and JEROME B. FLEISCHMAN, ESQ. Attorney for the Plaintiff NOEL REDDING, parties to the above entitled action, that whereas no party to this Stipulation is an infant or incompetent person for whom a Committee has been appointed and no person not a party to this Stipulation has an interest in the subject matter thereof, the above entitled action, be and the same hereby is discontinued, insofar as it alleges causes of action on behalf of said NOEL REDDING, without costs to either party hereto as against the other. The causes of action alleged on behalf of the said NOEL REDDING are discontinued with prejudice. This Stipulation may be filed without further notice with the Clerk of the Court."

316. The copy of the Redding Discontinuance which I have seen was signed by Mr Redding's attorney and the attorneys for the defendants, who were identified, in the title to the Redding Discontinuance, as Mr Hagood in his capacity as administrator of the Hendrix Estate, and *"et al"* (meaning *"and others"*), which I take to be a reference to AYE (Are You Experienced Limited), as the other defendant to the Supreme Court Claim. The Redding Discontinuance was not signed by Mr Mitchell or his attorney.

<u>The Mitchell Release and the Mitchell Discontinuance</u>

317. I come next to the terms of the Mitchell Release and the Mitchell Discontinuance. At the outset it should be noted that there are material differences between the Redding Release

and the Mitchell Release. The Mitchell Release also has more clauses and a different structure to the Redding Release.

318. The recitals to the Mitchell Release provided as follows:

> *"WHEREAS, I, JOHN GRAHAM MITCHELL, previously performed as a professional musician in a group known professionally as "THE JIMI HENDRIX EXPERIENCE" in which the said JIMI HENDRIX was the lead performer; and*
> *WHEREAS, said performances consisted of personal appearances, recording sessions, personal appearance performances which were recorded, and personal appearance performances which were filmed; and*
> *WHEREAS, I have heretofore made certain claims and filed a certain lawsuit against the ESTATE OF JIMI HENDRIX, deceased, and against a corporation, Are You Experienced Ltd ., a corporation fully owned and/or controlled by the ESTATE OF JIMI HENDRIX, said lawsuit having been instituted in the Supreme Court of the State of New York, County of New York, United States of America; and*
> *WHEREAS, it is my desire to settle all of said claims as against the ESTATE OF JIMI HENDRIX its successors and/or assigns and Are You Experienced Ltd ., its successors and/or assigns, and other persons and/or entities as hereinafter set forth.*
> *I, therefore; for myself, my heirs, executors and administrators, successors and assigns, in consideration of the sum of Two Hundred Forty-Seven Thousand Five Hundred ($247,500.00) Dollars, the receipt of which is hereby acknowledged, in hand paid (by the the ESTATE OF JIMI HENDRIX, deceased) on my instructions as follows, $17,500 to Stevens II. Weiss, Esq. and $15,000 to Phillips, Nizer, Benjamin, Krim & Ballon (for legal fees and disbursements) and $215, 000 to Schecter & Epstein Special Account, do by this instrument agree as follows:"*

319. Clause 1 contained, as they were expressed, the following release and covenant not to sue:

> *"1. I hereby release the ESTATE OF JIMI HENDRIX, deceased, its successors and/or assigns, Are You Experienced, Ltd ., its successors and/or assigns and any and all record companies or other entities with whom Said JIMI HENDRIX, his Estate, or their successors or assigns may have contracted in the past, or may contract in the future (excepting those reservations which are specifically set forth in paragraph 6 below) for the distribution and sale of records embodying performances of JIMI HENDRIX on which I performed, including any soundtrack recordings from any and all liability or responsibility to account to me for or pay royalties or other compensation to me in connection with any such recordings.*
> *Further, I covenant, promise and agree not to sue the ESTATE OF JIMI HENDRIX, its successors and/or assigns, Are You Experienced, Ltd ., its successors and/or assigns nor any such entities or record companies for compensation arising out of the distribution of any recordings made pursuant to such contracts or agreements."*

320. Clause 2 contained the following acknowledgment of the part of Mr Mitchell:

> *"2. By this release, I acknowledge full settlement of any compensation which I may have claimed, now claim or in the future may claim in connection with earnings on said recordings in the past, as well as any earnings which might result in the future from the sale of such recordings."*

321. There was then a further release, in clause 3, which was expressed to be related to the proposed Warner Brothers film based on the life of Jimi Hendrix:

> *"3. I hereby release the ESTATE OF JIMI HENDRIX, its successors and/or assigns and Are You Experienced, Ltd. , its successors and/or assigns from any and all claims which I may have for the use of my likeness and sound in connection with a motion picture based on the life of JIMI HENDRIX, produced and distributed by and through Warner Bros. Pictures, including any sound track recordings from said film."*

322. Clause 4 contained the following further covenant:

> *"4. I further covenant with the ESTATE OF JIMI HENDRIX, its successors and/or assigns and Are You Experienced, Ltd ., its successors and/or assigns forever to refrain from instituting or in any way aiding any claim, demand, action or cause of action for damages, expenses or compensation against said Estate and said corporation in connection with my performance or performances as a part of the group known as "The Jimi Hendrix Experience" or as a part of or in connection with any other recordings embodying any performance of the decedent, JIMI HENDRIX."*

323. Clause 5 contained a further acknowledgment on the part of Mr Mitchell:

> *"5. This release and covenant is made by me after negotiations in which I have been represented by counsel of my choice and is made by me on the advice of counsel and is not dependent upon any facts now known nor which may hereinafter be discovered."*

324. Clause 6 set out certain exceptions from what were referred to as the release and covenant not to use:

> *"6. Specifically excepted, reserved and excluded from this release and covenant not to sue are whatever claims and rights, if any, I, JOHN GRAHAM MITCHELL, may now have against the following: Warner Bros. Pictures with respect to my appearance in a certain motion picture entitled "JIMI HENDRIX, Barclay Records, Track Records, EMBER RECORDS, YAMETA COMPANY LTD. , WARNER BROS. RECORDS solely with respect to production services, MICHAEL JEFFERY and the ESTATE OF MICHAEL JEFFERY, CHAS. CHANDLER, MICHAEL JEFFERY and CHAS. CHANDLER doing business in any form (whether corporate, joint venture, partnership or otherwise). Such reservation of rights is not deemed or to be construed as any acquiescense or agreement by the ESTATE OF JAMES M. HENDRIX, its successors and/or assigns, or Are You Experienced, Ltd ., its successors and/or assigns, that I have any rights against such companies and other entities set forth herein. Nor is such reservation of rights to be deemed to be in any way in derogation of any rights which the ESTATE OF HENDRIX, its successors and/or assigns, Are You Experienced, Ltd., its successors and/or assigns may have with respect to any companies and entities set forth herein."*

325. Clause 7 contained a definition of the word *"Recordings"* as used in the Mitchell Release:

> *"7. I further agree and understand that the word "Recordings" as used herein includes discs, tape recordings, cassettes, audio visual cartridges, and any other means or modes now known and used or hereafter developed and used for the reproduction of sound and sound synchronized with visual images."*

326. Finally, clause 8 dealt with the intended discontinuance of proceedings against the Hendrix Estate and/or AYE:

> *"8. I further agree that my attorneys are instructed to enter stipulations for discontinuance with prejudice of the said action now pending in the New York County Supreme Court and any other actions or suits which I may have heretofore caused to be filed against the ESTATE OF JIMI HENDRIX and/or Are You Experienced, Ltd. in any jurisdiction throughout the world."*

327. Clause 9 provided that the Mitchell Release could not be changed orally.

328. As also explained in the narrative section of this judgment, the Mitchell Release was signed by Mr Mitchell, and also by the firm of attorneys acting for Mr Mitchell in the Historical New York Claims, recording their approval of the terms of the Mitchell Release.

329. Turning to the Mitchell Discontinuance, I have already set out the terms of the discontinuance, which I repeat for ease of reference:

> *"IT IS HEREBY STIPULATED that:*
>
> *1. The appeal of John Graham Mitchell from an order of the Supreme Court, New York County, dated July 16, 1974, which appeal now is pending before the Appellate Division of the New York State Supreme Court, First Department, be and hereby is withdrawn with prejudice and without costs to either party: and*
>
> *2. Whereas neither plaintiff John Graham Mitchell nor defendants are infants or incompetents, the above-captioned action be and hereby is discontinued as between said plaintiff and defendants, with prejudice, and without further costs to either party as against the other."*

330. The copy of the Mitchell Discontinuance which I have seen was signed by Mr Mitchell's attorney and the attorneys for the defendants, who were identified, in the title to the Mitchell Discontinuance, as Mr Hagood in his capacity as administrator of the Hendrix Estate, and AYE; that is to say the defendants to the Supreme Court Claim. The Mitchell Discontinuance was not signed by Mr Redding or his attorney.

<u>The principles of New York law relevant to the construction of the Releases and the effect of the Discontinuances – preliminary points</u>

331. Before I come to the agreed principles of New York law, there are four preliminary points which I should make.

332. First, in approaching the expert evidence I keep in mind the principles which apply where a court is assessing expert evidence on foreign law. These principles have been helpfully summarised by Blair J in his judgment in *Banco Santander Totta SA v Companhia De Carris De Ferro De Lisboa SA* [2016] EWHC 465 (Comm); [2016] 4 WLR 49. I need not set out [237] in full, but the principles identified in the following sub-paragraphs (3), (4) and (5) are particularly pertinent in the present case:

"(3) The court's approach to conflicts of expert evidence is to resolve the conflicts in the same way that it approaches other conflicts of fact (Morgan Grenfell & Co Ltd v SACE [2001] EWCA Civ 1932, at [48] (Clarke LJ)). (4) In doing so, the court must bear in mind the purpose for which the evidence of foreign law is given: "This is to predict the likely decision of a foreign court, not to press upon the English judge the witness's personal views as to what the foreign law might be" (MCC Proceeds Inc v Bishopsgate Investment Trust plc [1999] CLC 417, 424–425 (Evans LJ)). (5) In the light of this, the function of an expert witness on foreign law is: (i) to inform the Court of the relevant contents of the foreign law; identifying statutes or other legislation and explaining where necessary the foreign court's approach to their construction; (ii) to identify judgments or other authorities, explaining what status they have as sources of the foreign law; and (iii) where there is no authority directly in point, to assist the English judge in making a finding as to what the foreign court's ruling would be if the issue was to arise for decision there (ibid, p 424)."

333. Second, I heard a very substantial quantity of expert evidence from the two experts, accompanied by a huge volume of New York and other US case law. I have already commented on the quality of the assistance which I received from the two experts. That said, there is a cautionary note to be sounded in relation to the expert evidence, independent of the fact that I have concluded that the Claims fail without the need to consider the effect of the Releases or the Discontinuances. Ultimately, the central questions which I have to resolve in this context are questions of construction of the relevant documents; that is to say reading the relevant documents and deciding what they mean. It was apparent from the expert evidence that this construction process, when conducted by reference to the principles of New York law, engaged some differences to the principles of construction which would have applied in this jurisdiction. Differences do exist, but they did not seem to me, for want of a better expression, to be dramatic differences. In these circumstances I can take both the agreed principles of New York law and the issues on the expert evidence, so far as they arose, more shortly than in the evidence and argument. I have taken into account all the many arguments and authorities put before me in relation to the issues arising on the expert evidence but, so far as it is necessary to spell this out, the parties should not expect to find express reference to every argument and every authority. I put the matter this way because, as a general principle, there is no obligation upon a judge, in their judgment, to deal expressly with every argument and item of evidence placed before them. This general principle applies to the entirety of this judgment. I spell the general principle out at this point because the arguments and evidence in relation to New York law were extensive, and of particular density.

334. Third, I should mention that, by way of assistance to me in navigating the New York and other case law cited in the expert evidence, I was provided by the experts with a most helpful agreed summary and chart of the structure and hierarchy of the courts of New York and the United States federal courts. It is not necessary to reproduce the content of the summary and chart in full. I have included, in an Annex to this judgment, an outline summary of the court structure and hierarchy in New York and the United States which will, I hope, assist the reader in understanding the basic structure and hierarchy of the court system. My analysis of the New York case law put before me by the experts assumes familiarity with the outline summary in the Annex.

335. Fourth, I have noted that the decisions in the cases cited by the experts are referred to as Opinions, not judgments. I have found it easier to use the more familiar expression (in this jurisdiction) *"judgment"* to refer to the Opinions in the cases to which I make express reference. It will be understood that I intend no disrespect to the federal or state jurisdictions in the United States in adopting this method of reference.

<u>The principles of New York law relevant to the construction of the Releases and the effect of the Discontinuances – the agreed principles</u>

336. I take the agreed principles of New York law from a most helpful agreed list of issues compiled by the parties' legal teams and the experts, which shows, in shorter form than the experts' joint statement, what was agreed between the experts and what was in dispute. By reference to this agreed list of expert issues, the relevant agreed principles of New York law were as follows:
    (1) The experts agreed the following general principles of interpretation:
        (i) The object of contractual interpretation is to effectuate the parties' purpose and intent.
        (ii) Courts look to the objective manifestation of the parties' intent rather than to a subjective intent.
        (iii) The plain meaning rule is the cornerstone of the New York law of contractual interpretation.
        (iv) The plain meaning rule means that the courts do not look outside the *"four corners"* of the written contract unless there is an ambiguity (but releases are subject to special rules).
    (2) The experts agreed the following general principles relating to the interpretation of releases:
        (i) Releases are contracts and governed by the rules for contracts.
        (ii) Releases must be construed in accordance with the objective intent of the parties.
        (iii) Releases are subject to special rules.
        (iv) A release is a present abandonment of a known right or claim.
        (v) The courts look with disfavour upon agreements intended to absolve a party from their wrongdoing and any such agreement is given the *"closest judicial scrutiny"*.
        (vi) The meaning of the release depends on the claims being settled and the purpose of the release.
    (3) A contract is unambiguous if the language it uses has a definite and precise meaning, with no danger of misconception, for which there is no reasonable basis for a difference of opinion. In determining whether there is an ambiguity, the agreement must be read as a whole to ensure that excessive emphasis is not placed upon particular words or phrases, and in light of the agreement's purpose and the parties' intent. The existence of ambiguity is determined by examining the entire contract and considering the relation of the parties and the circumstances under which it was executed, with the wording viewed in the light of the obligation as a whole and the intention of the parties as manifested thereby.
    (4) There is an anti-surplusage rule. This rule reflects the nearly dispositive presumption that parties ordinarily do not include words or phrases in their agreements that serve no purpose. When a term appears to be meaningless when taken literally and/or out of context, New York courts are directed to reject form over substance and instead to assign a sensible meaning to the term in light of the parties' intent and purpose as manifested in the agreement as a whole.

(5) In relation to the question of whether a release can apply to an unknown claim, the experts agreed the following principles:
   (i) In general, courts have held that a release that employs general terms will not bar claims outside the parties' contemplation at the time the release was executed.
   (ii) The scope of a release is determined by the manifested intent of the parties.
   (iii) The meaning and coverage of a release depend on the claims being settled and the purpose of the release.
   (iv) When the words of the release are of general effect the release is to be construed most strongly against the releasor.
   (v) Recitals in a release may assist in determining the scope of the release.
   (vi) A release will only apply to unknown claims where the parties so intended and the agreement is fairly and knowingly made. The actual effect of this fairly and knowingly made doctrine was in dispute between the experts.

(6) In relation to the question of whether releases can apply to future conduct, the experts agreed the following principles:
   (i) Future claims are the subject matter of covenants not to sue, not releases.
   (ii) A document may be framed as a release, but where it relates to future conduct, it is treated as a covenant not to sue.

(7) Covenants not to sue are permitted, but are disfavoured, subjected to high judicial scrutiny, will be strictly construed and must be clear and unequivocal.

(8) There are strong public policy considerations which favour the enforcement of settlement agreements, including avoiding potentially costly, time-consuming litigation and preserving judicial resources, and the fact that a settlement produces finality and repose upon which people can order their affairs. A release is a jural act of high significance without which the settlement of disputes would be rendered all but impossible. It should never be converted into a starting point for renewed litigation except under circumstances and under rules which would render any other result a grave injustice.

(9) The experts agreed the following general principles relating the interpretation of discontinuances:
   (i) A discontinuance with prejudice gives rise to *res judicata.*
   (ii) The *res judicata* effect applies both to the parties and their privies, including by succession in interest.

(10) The courts of New York use the transactional approach to determine the scope of res judicata arising from a discontinuance. In particular:
   (i) This approach means *res judicata* applies to claims which were litigated, but also claims which could have been raised in prior litigation.
   (ii) The court will apply the following factors; namely whether (a) the same transaction or a connected series of transactions is at issue, (b) the same evidence is needed to support both claims, (c) the facts essential to the second action were present in the first, (d) the claims in the first and second actions arise from the same factual grouping, (e) the underlying facts are related in time, space, origin, or motivation, (f) both claims form a convenient trial unit, (g) treatment of the claims as a unit conforms to the parties' expectations or business understanding or usage, and (h) if the claims are sufficiently similar that a different judgment in the second action would destroy or impair rights or interests established by the first.

(11) Collateral estoppel (issue estoppel) cannot apply to either of the Discontinuances because the plaintiffs had no *"full and fair opportunity to litigate"* issues relevant to the PPRs.

The principles of New York law relevant to the construction of the Releases and the effect of the Discontinuances – the expert issues

337. The first and second expert issues can be taken together. In overall terms, the first and second issues are concerned with the question of what test the New York courts would apply if they were required to determine whether a release or covenant not to sue applied to intellectual property rights which came into force on a date after the relevant agreement was made.

338. Both experts accepted that it was possible for releases and covenants not to sue to apply to future legal rights and claims which did not exist at the time of the relevant settlement agreement. The disagreement related to the approach which the New York courts would adopt in deciding whether an agreement extended to future legal rights and claims. In his first expert report, at paragraph 87, Mr Cohen suggested the following test:

> *"87. On balance, I believe that under New York law, a release could theoretically discharge claims that do not exist at the time the release is executed, provided that the language of the release clearly and unambiguously expresses the parties' intent to include precisely such claims. Absent such language, I do not believe a release would bar such claims."*

339. I understood Mr Cohen to say that a similar test should apply in the case of a covenant not to sue.

340. In support of his position Mr Cohen drew upon case law relating to U.S. federal copyright legislation which provided for an initial fixed term of copyright, followed by a statutory right of renewal for a further term. The logic behind this legislation, as I understood the expert evidence, was that it allowed the author of the relevant copyright work a second copyright term, at a point where, in contrast to the position when the original copyright term began, the author would be in a much better position to understand the value of the copyright. The relevant work might turn out to have been an outstanding success, with the consequence that the copyright was very valuable, or the position might be the opposite. I understand that the statutory right of renewal was treated by U.S. law as presumptively excluded from a conveyance of the original copyright.

341. By contrast, Professor Kraus drew upon what he referred to as the *"new use jurisprudence"* to argue that the New York courts would enforce releases and covenants not to sue which clearly and unequivocally covered claims in the future. This new use jurisprudence is summarised in a table of cases which Professor Kraus included in his first expert report. In very broad summary, each of the cases in this table was concerned with the question of whether a contract relating to the exploitation of copyright works extended to new forms of exploitation of the relevant works, such as motion pictures, videocassette recordings, e-books and other technological developments. Professor Kraus explained the relevance of the new use jurisprudence at paragraph 65 of his expert report:

> *"The question of whether an intellectual property settlement agreement includes new uses is analogous to the traditional question of whether a release includes unknown claims (i.e., claims based on unknown pre-release conduct or unknown*

consequences of pre-release conduct). The new use doctrine addresses the question of whether the parties contemplated a use of the copyrighted work even though that use had yet to be invented at the time of the release."

342. Although the quotation is rather lengthy, I find it helpful to set out in full paragraphs 125 and 126 of Professor Kraus' first expert report (omitting footnotes), which summarise his approach to the question of the test to be applied by the New York courts in relation future rights and future claims:

> *"125. New York law enforces releases that clearly and unequivocally cover claims in the future. I have opined above that New York courts would rely on the "new use" jurisprudence to conclude that a covenant not to sue includes claims based on future legal rights if it contains specific language broad enough to include those claims. Although New York courts require no more than finding that a license includes such broad language in order to find that it includes the new use, a judicial finding that the post-settlement creation of those rights—or at least those kinds of rights—was foreseeable by the parties and/or experienced members of the relevant industry at the time the release was executed provides additional, independent support for the same conclusion. Moreover, as discussed above, a New York court has already recognized the legal enforceability of a settlement agreement's express language releasing not only claims "hereafter ... revived in the future" but also claims "hereafter existing ... whatsoever in law." "Claims hereafter existing whatsoever in law" are claims based on future legal rights.*
>
> *126. As I explained above, two lines of authority from caselaw support the view that a New York court would enforce a clear covenant not to sue based on a future legal right. First, the retroactivity jurisprudence in Becker and Ianelli emphasizes the priority that New York courts place on the fairness and finality of settlements to justify New York's rejection of the retroactive application of post-settlement legal changes to settlements. And the Bensky court's recognition, in dicta, of the legal enforceability of settlement agreements that release "claims hereafter existing ... whatsoever in law" provides even stronger authority that a covenant not to sue can include claims based on future legal rights. Second, the reasoning in the "new use" jurisprudence suggests New York courts would conclude that a covenant not to sue includes claims based on future legal rights if it contains specific language broad enough to include those claims. And again, although New York courts require no more than such a finding that a license includes such broad language to hold that it includes the new use, a judicial finding that the post-settlement creation of those rights—or at least those kinds of rights—was foreseeable by the parties and/or experienced members of the relevant industry at the time the release was executed provides additional, independent support for the same conclusion."*

343. I do not find it necessary to go through all the case law cited by Mr Cohen and Professor Kraus in support of their respective positions. I prefer the evidence of Professor Kraus on the first and second expert issues. I say this for the following reasons.

344. First, it was clear to me, from the cases referred to in this debate, that the approach of the New York courts to the question of whether a release or covenant not to sue extends to a future right or claim is ultimately one of construction of the relevant agreement. The

question is whether the relevant right or claim is within the scope of what was originally agreed.

345. Second, it seems to me that it is important to keep in mind the nature of intellectual property rights. The experts were agreed that a copyright comprises a bundle of legal rights, each corresponding to the right to authorise or prohibit particular acts. The same applies to performers' rights. Rights may expand to cover new uses, such as the introduction of the making available right to accommodate digital exploitation of music. On this basis, the *"new use"* case law referred to by Professor Kraus seems to me to be apt to apply to the question of whether new or expanded intellectual property rights are within the scope of a particular release or covenant not to sue.

346. Third, Professor Kraus identified a further body of case law which was concerned with the question of whether one party to a settlement could take advantage of a change in the law, subsequent to the settlement. Of these cases I need only mention, by way of example, the decision of the Supreme Court, Appellate Division (Second Department, New York) in *Ianelli v North River Insurance Company* 119 A.D.2d 317. In this case there was a settlement of a worker's third party action for injuries arising out of an accident at work. Subsequent to the settlement the worker sought additional payments from the workers' compensation insurer, on the basis of a decision of the New York Court of Appeals which established the right to claim those additional payments. The Appellate Division upheld the decision of the Supreme Court that the plaintiff was not entitled to benefit from the change in the law because his third-party action had been terminated pursuant to a stipulation of settlement which constituted a final and binding agreement to resolve any and all of the plaintiff's claims. It seems to me that the reasoning in this and the accompanying cases cited by Professor Kraus is capable of applying, by analogy, to a case where the question is whether a settlement extends to intellectual property rights or claims coming into existence after the settlement. If the settlement is sufficiently widely expressed there is no reason, in my view, why it should not extend to such rights or claims.

347. Fourth, I am doubtful that Mr Cohen's analogy with the former statutory right of renewal in relation to copyrights is of much value in this context. The policy behind that legislation is obvious. Authors were given some protection against signing away their copyright in a work on terms which failed to reflect the subsequent success of the work and the consequential increase in the value of the copyright. The statutory right of renewal which did not, as I understand the legislation, pass with the original copyright, gave authors the opportunity for a second bite of the cherry, at a time when they and parties with whom they were dealing would be much better placed to put a fair value on the renewed copyright. This was however a specific legislative solution to a particular problem. I do not think that it can be adopted as the correct approach when considering whether a new right or claim falls within the scope of a release or a covenant not to sue.

348. The second expert issue poses the specific question of whether the decision of the Court of Appeals of New York in *Cahill v Regan* 5 N.Y.2d 292 (1959) assists in relation to the test to be applied by the New York courts in determining whether a release or covenant not to sue applies to future legal rights or future claims. In my view the decision is of some assistance. The case was concerned with a dispute between an employee and an employer over the ownership of a patent for an article which had been created by the employee. It was argued by the employee's executors (the employee had died) that a

general form of release which had been signed, in settlement of a dispute over the ownership of certain machinery had extinguished any rights which the employer might have had in relation to the article, including the patent. This argument was rejected by the Court of Appeals, for the following reasons:

> *"The defendant urges, however, that the general release executed by Roberts extinguished any and all rights and claims which the employer might have had, including a claim to the patent or to the shop right. Although the effect of a general release, in the absence of fraud or* *****510*** *mutual mistake, cannot be limited or curtailed (see Lucio v. Curran, 2 N.Y.2d 157, 161, 157 N.Y.S.2d 948, 951; Kirchner v. New Home Sewing Mach. Co., 135 N.Y. 182, 188, 31 N.E. 1104, 1106), its meaning and coverage necessarily depend, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given. Certainly, a release may not be read to cover matters which the parties did not desire or intend to dispose of. In the case before us, the defendant, without the knowledge of his employer, applied for the patent in July of 1950. The replevin action, commenced some months earlier, was settled and general releases exchanged in April, 1951, more than a year before the patent was issued to the defendant. When the releases were executed, it is clear, the parties were solely concerned with settling the controversy then being litigated, the ownership of machinery in the employer's possession, a subject having no relation to the invention or the patent. Indeed, not only was no patent then in existence, but the employer was not even aware that one had been applied for. In the right of such facts, the Appellate Division was fully justified in concluding that Roberts' release covered and barred only those matters about which there had been some dispute* ****300*** *(see Simon v. Simon, 274 App.Div. 447, 451, 84 N.Y.S.2d 307, 310), not a possible future claim by the employer that he owned the patent or had a shop right to practice the inventions."*

349. I note that in this case the Court of Appeals were not concerned with rights which did not exist at the time of the settlement. Nevertheless, the case seems to me to be another demonstration of the fact that a release or covenant not to sue may be capable of extending further than the parties intended or foresaw. What matters is the scope of the relevant settlement, in respect of which it is important to consider the controversy which the parties were intending to settle.

350. The second expert issue also poses the specific question of whether the new use jurisprudence holds that what was referred to as the *"Bartsch foreseeability test"* is a relevant consideration. The case in question is the decision of the United States Court of Appeals, Second Circuit, in *Bartsch v Metro-Goldwyn-Mayer* 391 F.2d 150 (1968). *Bartsch* is one of the cases cited by Professor Kraus as part of the new use jurisprudence. The case, which was a federal case, was concerned with whether an assignee of motion picture rights of a musical play was entitled to authorise the telecasting of its copyrighted film. Professor Kraus identified the following extract from the judgment in *Bartsch* as the origin of what he referred to as the *Bartsch* foreseeability test:

> *"Unfortunately, when we turn to state law, we find that it offers little assistance. Two other situations must be distinguished. This is not a case like Manners v. Morosco, 252 U.S. 317, 40 S.Ct. 335, 64 L.Ed. 590 (1920), cited with approval, Underhill v. Schenck, 238 N.Y. 7, 143 N.E. 773, 33 A.L.R. 303 (1924), in which an all encompassing grant found in one provision must be limited by the context created by other terms of the agreement indicating that the use of the copyrighted*

material in only one medium was contemplated. The words of Bartsch's assignment, as we have shown, were well designed to give the assignee the broadest rights with respect to its copyrighted property, to wit, the photoplay. 'Exhibit' means to 'display' or to 'show' by any method, and nothing in the rest of the grant sufficiently reveals a contrary intention.1 Nor is this case like Kirke La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 188 N.E. 163 (1938), in which the new medium was completely unknown at the time when the contract was written. Rather, the trial court correctly found that, 'During 1930 the future possibilities of television were recognized by knowledgeable people in the entertainment and motion picture industries,' though surely not in the scope it has attained. While Kirke La Shelle teaches that New York will not charge a grantor with duty of expressly saving television rights when he could not know of the invention's existence, we have found no case holding that an experienced businessman like Bartsch is not bound by the natural implications of the language he accepted when he had reason to know of the new medium's potential."

351. The point made by Professor Kraus in cross examination was that this foreseeability test had never been found by the New York courts to be required in order for a new use to be within the scope of a licence. Professor Kraus drew attention to the following reasoning of the court in *Bartsch*, later in the judgment (the underlining is my own):

> *"With Bartsch dead, his grantors apparently so, and the Warner Brothers lawyer understandably having no recollection of the negotiation, any effort to reconstruct what the parties actually intended nearly forty years ago is doomed to failure. In the end, decision must turn, as Professor Nimmer has suggested, The Law of Copyright 125.3 (1964), on a choice between two basic approaches more than on an attempt to distill decisive meaning out of language that very likely had none. As between an approach that 'a license of rights in a given medium (e.g., 'motion picture rights') includes only such uses as fall within the unambiguous core meaning of the term (e. g., exhibition of motion picture film in motion picture theaters) and exclude any uses which lie within the ambiguous penumbra (e.g., exhibition of motion picture film on television)' and another whereby 'the licensee may properly pursue any uses which may reasonably be said to fall within the medium as described in the license,' he prefers the latter. So do we. But see Warner, Radio and Television Rights 52 (1953). If the words are broad enough to cover the new use, it seems fairer that the burden of framing and negotiating an exception should fall on the grantor; if Bartsch or his assignors had desired to limit 'exhibition' of the motion picture to the conventional method where light is carried from a projector to a screen directly beheld by the viewer, they could have said so. A further reason favoring the broader view in case like this is that it provides a single person who can make the copyrighted work available to the public over the penumbral medium, whereas the narrower one involves the risk that a deadlock between the grantor and the grantee might prevent the work's being shown over the new medium at all."*

352. I accept the evidence given by Professor Kraus in cross examination in relation to the *Bartsch* foreseeability test. It seems clear to me, from the case law referred to by the experts in the context of the first and second expert issues, that there is not a foreseeability test established by the new use jurisprudence. Nor is there such a test to be imported into consideration of the question of whether a release or covenant not to sue includes a future right or a future claim. What matters is the scope of the relevant release or covenant not

to sue, which in turn depends upon the language used by the parties. Indeed, I am not convinced that it is appropriate to refer to a *Bartsch* foreseeability test at all. I do not read the decision in *Bartsch* as establishing or acknowledging such a test. This may not matter, given that Professor Kraus, as I understood his evidence, was only referring to the topic of foreseeability in order to make the point that the new use jurisprudence did not support the existence of such a test.

353. Drawing together all of the above analysis, my findings and conclusions on the first and second expert issues, as a matter of New York law, can be summarised as follows:
    (1) The test which the New York courts would apply, in determining whether a release or covenant not to sue applied to intellectual property rights coming into force after the relevant agreement would be analogous to the approach of the New York courts which emerges from the new use jurisprudence. The question would therefore be one of construction of the relevant agreement, in order to determine the true scope of the release or covenant not to sue.
    (2) I consider that the New York courts would also apply, by analogy, the approach to the question of how new rights may affect a settlement which emerges from *Ianielli* and other cases cited by Professor Kraus in this category.
    (3) I do not consider that the New York courts would consider an analogy with the former federal legislation concerning copyright renewal to be helpful.
    (4) I consider that the New York courts would regard *Cahill v Regan* as being of some assistance in this context, as a case on the scope of releases.
    (5) I do not consider that the new use jurisprudence holds that the *Bartsch* foreseeability test is a relevant consideration. I should add that I am not myself convinced that there is actually any such test.

354. The third expert issue is one which I have mentioned in my earlier review of the expert evidence. As I have explained, the issue was concerned with the extent of a doctrine, recognised by New York law, which was referred to as the fairly and knowingly made doctrine. The experts were agreed that a release could be set aside if, and to the extent that it could be demonstrated that it had not been fairly and knowingly made by the releasor. The issue was whether the doctrine was also capable of applying to the process of construction of a release, by way of interpretation and *"contextualisation"*. Mr Cohen was of the view that it could. Professor Kraus was of the view that it could not.

355. The Defendant objected to the Claimants' reliance on the fairly and knowingly made doctrine on the basis that it had not been pleaded by the Claimants. I will come to consider this pleading objection when I come specifically to consider the Releases. For the moment, I consider the issue between the experts, without prejudice to my decision on the pleading objection.

356. I prefer the view of Professor Kraus on this issue. It is clear, from the case law, that a release, as a contractual agreement, may be set aside on the ground that it was not fairly and knowingly made, such as where, because the releasor has had little time for investigation or deliberation, or because of the existence of overreaching or unfair circumstances, it was deemed inequitable to allow the release to serve as a bar to the claim of an injured party; see (by way of example) the decision of the Supreme Court, Appellate Division (Fourth Department, New York) in *Pastrana-Ortiz v Wemple* 239 A.D.3d 1290 (2025).

357. The application of the doctrine was stated in the following terms by the Court of Appeals of New York in *Mangini v McClurg* 24 N.Y.2d 556 (1969), in the context of an action to set aside a general release and recover damages for injuries sustained by a minor in a car accident (the underlining is my own):

> *"In Farrington v. Harlem Sav. Bank, 280 N.Y. 1, 19 N.E.2d 657, it was established that a release could be made covering both known and unknown injuries, 'provided the agreement was fairly and knowingly made' (Id., at p. 4, 19 N.E.2d, at p. 657). This limitation on releases for unknown injuries, first applied to a claim that the plaintiff thought he was signing a mere receipt for money to pay a doctor's bill, was applied in other cases of fraud (Wheeler v. State of New York, 286 App.Div. 310, 143 N.Y.S.2d 83; *****517** Scheer v. Long Is. R.R. Co., 282 App.Div. 724, 122 N.Y.S.2d 217). Fraud, however, had long been a ground for setting aside a release (see ***567** Fleming v. Brooklyn Hgts. R.R. Co., 95 App.Div. 110, 88 N.Y.S. 732). The requirement of an 'agreement fairly and knowingly made' has been extended, however, to cover other situations where because the releasor has had little time for investigation or deliberation, or because of the existence of overreaching or unfair circumstances, it was deemed inequitable to allow the release to serve as a bar to the claim of the injured party (see, e.g., Duch v. Giacquinto, 15 A.D.2d 20, 222 N.Y.S.2d 101; Landau v. Hertz Drivurself Stas., 237 App.Div. 141, 260 N.Y.S. 561; Castenada v. Ruderman, 48 Misc.2d 321, 264 N.Y.S.2d 744)."*

358. The only case however of which I was made aware which might be said to support a wide application of the fairly and knowingly made doctrine was *Johnson v Lebanese University* 84 A.D.3d 427 (2011); the case mentioned in my earlier review of the expert evidence. In this case the plaintiff worked in marketing for the defendant university until the defendant terminated his employment. The plaintiff was informed that his employment was being terminated for poor performance, and was paid a sum of money in return for signing a form of release and discharge which was expressed to be in full and final settlement of any claims which he might have against the university relating to his services. The plaintiff subsequently obtained information which, so he alleged, demonstrated that his employment had been terminated because of his sexuality. The plaintiff then commenced an action against the university on the basis of discrimination. The defendant moved for summary judgment in its favour, on the basis of the release.

359. At first instance summary judgment was granted, but this was overturned by the appeal court, on the basis that there were factual issues as to whether the plaintiff had knowingly released employment discrimination claims against the university. In their judgment the majority of the judges stated that for a release to extend to claims both known and unknown it must have been both *"fairly and knowingly made"*. This did not mean that releasor had to show that they had been induced to sign the release by fraud, but it did require circumstances, of which examples were cited, in which it would be deemed inequitable to allow the release to serve as a bar to the claim of the injured party. The judgment then went on to record the issues of fact which had been raised by the plaintiff, and which meant that the lower court had been wrong to grant summary judgment.

360. Mr Cohen's argument was that if one examined the language of the judgment in *Johnson*, one could see that, in contrast to cases such as *Pastrana-Ortiz*, the fairly and knowingly made doctrine was being relied upon as a means of examining the scope of the release. I can see, from the language of the judgment, how Mr Cohen came to this conclusion, but I do not think that his conclusion is correct. The problem with the judgment in *Johnson*,

if I may respectfully say so, seems to me to be that it does not distinguish between two different issues which were under discussion in the judgment. The first matter was the enforceability of the release. The release would not be enforceable, at trial, if the plaintiff established that the release was not fairly and knowingly made. The second matter was the scope of the release. By reason of the factual issues raised by the plaintiff, there was a triable issue as to whether the release, on its true construction, actually covered discrimination claims. In my view, if one reads the judgment in *Johnson* carefully, it is apparent that the fairly and knowingly made doctrine was not being used by the court to contextualise the release or as an aid to construction. Rather, it was being referred to as a means by which the plaintiff might, at trial, be able to establish that the release was not a bar to his discrimination claim, by virtue of being unenforceable.

361. As Professor Kraus explained in cross examination, where a party alleges that a contract should be set aside and is void ab initio, the starting point is not the four corners of the relevant contract, but whether there is evidence of the alleged grounds for setting aside the relevant agreement, whether fraud, mutual mistake, impossibility, duress and, in the case of releases, whether the relevant release was fairly and knowingly made. In such cases one was not interpreting the relevant agreement, but investigating whether the bargaining process was free, fair and voluntary. It seems to me that this distinction is consistent with what can be found in the case law to which I was directed; namely that the fairly and knowingly made doctrine is confined, in its application, to the question of whether a release can be set aside.

362. I therefore find, and conclude on the third expert issue, as a matter of New York law, that the fairly and knowingly made doctrine is available only as a basis for setting aside a release. It cannot be used to interpret or contextualise a release.

363. The fourth expert issue is whether there is a modified application of the parol evidence rule such that the courts of New York will usually look to extrinsic evidence when construing the scope of a release. The suggested contrast is with the normal application of the parol evidence rule, which means that consideration of extrinsic evidence is only permitted where the terms of the relevant agreement are incomplete.

364. The experts were agreed that the parol evidence rule was subject to some modified application in the case of releases. An explanation of this modified application can be found in *Mangini v McClurg*. In their judgment in this case the New York Court of Appeals explained this modification in the following terms:

> *"It is true that a general release is governed by principles of contract law. There is little doubt, however, that its interpretation and limitation by the parol evidence rule are subject to special rules. These* ******513*** *rules are based on a realistic recognition that releases contain standardized, even ritualistic, language and are given in circumstances where the parties are sometimes looking no further than the precise matter in dispute that is being settled. Thus, while it has been held that an unreformed general release will be given its full literal effect where it is directly or* *****390*** *circumstantially evident that the purpose is to achieve a truly general settlement (Lucio v. Curran, 2 N.Y.2d 157, 157 N.Y.S.2d 948, 139 N.E.2d 133), the cases are many in which the release has been avoided with respect to uncontemplated transactions despite the generality of the language in the release form (e.g., Cahill v. Regan, 5 N.Y.2d 292, 184 N.Y.S.2d 348, 157 N.E.2d 505; Mitchell v. Mitchell, 170 App.Div. 452, 456, 156 N.Y.S. 76, 79; see, also, Simon v.*

Simon, 274 App.Div. 447, 449, 84 N.Y.S.2d 307, 309; Haskell v. Miller, 221 App.Div. 48, 222 N.Y.S. 619, affd. 246 N.Y. 618, 159 N.E. 675; Rubinstein v. Rubinstein, Sup., 109 N.Y.S.2d 725, 732, affd. 279 App.Div. 1073, 113 N.Y.S.2d 277, affd. 305 N.Y. 746, 113 N.E.2d 149; 49 N.Y.Jur., Release and Discharge, ss 19, 31, 34, 35, 46).”

365. It was not entirely clear to me how this expert issue was said to have arisen, or why it mattered, given the general agreement between the experts that releases and, as I understood the position, covenants not to sue are subject to special rules under New York law. I also found the reference to the parol evidence rule, in the framing of this issue, to be confusing. It seemed to me that the issue was directed to the plain meaning rule; that is to say the rule of New York law that, subject to the special rules which apply to releases, courts do not look outside the four corners of the written contract, unless there is an ambiguity.

366. In any event, this particular dispute appeared to have arisen because Mr Cohen, in the joint statement of the experts, had expressed the view that the New York courts would examine parol evidence in the case of releases, *“where any ambiguity is possible”*.

367. I have read through the relevant extracts from the cross examination of Mr Cohen and Professor Kraus on this particular issue. I am not convinced, in terms of the overall thrust of their evidence on this issue, that there was any difference between the experts. By way of example, I refer to the following extracts from each of the cross examinations.

368. I start with the cross examination of Mr Cohen, at **[T3/66/14-67/17]**:

“I think we've been through this, and I can repeat if it helps the court. I think New York law encourages us to examine the context of a release. Whether that is encouraging us to seek an ambiguity first or just look at the context, you know, may be a distinction without a difference. But I wouldn't say it's wrong that we need some sort of ambiguity.

Q. It's a very simple point, though, Mr Cohen. I don't understand why you continue to dance around it. The principle is, you start with the contract, and if it's not ambiguous, you interpret it. You don't include parol evidence unless there's an appeal to it.

A. I wouldn't say it's a simple point. I don't want to complicate matters. I don't want to make New York law sound more complicated than it already is, and I certainly don't want to present difficulties to this court. But yes, generally speaking we find an ambiguity first.

Q. Not just generally speaking. It's a requirement of the introduction of parol evidence.

A. Generally speaking, we find an ambiguity first, and that may even be true for releases. I just wanted to be clear that under New York law, we are encouraged to look at the context. It may be that, yes, we should be searching for ambiguities in order to look for that context. I don't think a release that was perfectly clear on its face would require too much context, if such a release exists.”

369. There is then the cross examination of Professor Kraus. In cross examination Professor Kraus gave a lengthy exposition of the operation of the parol evidence rule and the plain meaning rule. In the course of that exposition Professor Kraus made the following comments on the decision in *Mangini*, at **[T4/35/9-36/14]**:

"So the judge is certainly allowed to consider that this release arose out of litigation in which particular claims were being adjudicated. Mangini even goes so far as to say, in some cases, they can consider the negotiations that gave rise to the settlement.

Now, in my view, the strict plain meaning rule would not allow in evidence of negotiations. In fact, there's lots of cases where they don't. But I think what the court is saying is we're more receptive here. We're a little looser with the plain meaning rule when we're looking at releases and covenants that are part of settlements (inaudible) that are arising out of litigation, and so we want to understand, that's what the court means when it says that, "the parties are sometimes looking no further than the precise matter in dispute that is being settled".

Now, how could a court consider the precise matters in the dispute that's being settled without taking a look at the precise matters in dispute being settled? And if the plain meaning rule prohibited a judge from even seeing that, you just have to look at the release and nothing else in the world, then they wouldn't be able to do it. So I think all Mangini is saying is the court -- if one were otherwise inclined to construe the plain meaning rule, to exclude the evidence that includes the dispute before the parties that gave rise to the settlement, we are saying, on the Court of Appeals, that's not true. They can look at that settlement. They can look at that litigation.

That's my best effort."

370. I find it hard to see a material distinction between the two experts, in terms of the modification of the parol evidence rule in the case of release. Both provide a helpful commentary. Both avoided stating an absolute rule, in terms of ambiguities in the relevant agreement. In my view that was a wise course. It is apparent from the case law to which I was referred that, in common with this jurisdiction, laying down absolute rules in relation to the construction of agreements is not an easy thing to do.

371. Doing my best with an issue which does not seem to me to be a real issue on the expert evidence, I find and conclude on the fourth expert issue, as a matter of New York law, as follows:
    (1) In the case of releases and covenants not to sue, the application of the parol evidence rule, or more accurately (in my view) the plain meaning rule is subject to modification.
    (2) One aspect of that modification is that the court will, as a general rule, be more ready to consider the context and circumstances in which the relevant settlement agreement was entered into.
    (3) Ambiguity is relevant in the sense that if the relevant agreement is perfectly clear, on its face, resort to context and circumstances should be unnecessary.
    (4) I add the point that it strikes me as unwise, and potentially unreliable, to try to achieve the statement of a hard and fast rule in this respect. As was apparent from the expert debate on this topic, it is not necessarily a sensible exercise to try to impose a rigid order on the modified application of the parol evidence rule/plain meaning rule in the case of releases and covenants not to sue.

372. The fifth expert issue engages the question of the effect of a covenant not to sue. The view of Professor Kraus was that a covenant not to sue operates as a bar to a subsequent suit based on conduct covered by the covenant not to sue. The covenant not to sue renders

the subsequent suit non-justiciable, so that it must be dismissed. Mr Cohen did not agree that a dispute based on conduct covered by the covenant not to sue is non-justiciable. His view was that the covenant not to sue did not bar the suit, which could be brought. The proper remedy in such a case, for the party with the benefit of the covenant not to sue, was to claim damages for breach of the covenant.

373. Professor Kraus relied upon the decision of the Supreme Court (New York County, Special Term) in *Colton v New York Hospital* 98 Misc.2d 957 (1979). The case was concerned with a medical malpractice suit. The defendants relied upon a release signed by one of the plaintiffs in the course of the medical procedures which had given rise to the claim. The judge in the Supreme Court determined that the release took effect as a covenant not to sue, and that the covenant not to sue did have a delimiting effected, as explained in the judgment, on the plaintiffs' claims.

374. For present purposes, the relevance of the case lies in the judge's analysis of the distinction between a release and a covenant not to sue, and the effect of a covenant not to sue:

> *"Finally, perhaps the most important difference between a covenant not to sue and a release the effectiveness of the agreement as a bar to a subsequent action by a breaching promisor has long been recognized as being invariably a distinction without a difference. Since equity would not permit specific performance of a covenant not to sue, an action would lie for its breach. The measure of the aggrieved promisee's damages, however, would except for attorneys fees, be equal to his original liability on the underlying claim. Thus, in order to prevent a circuity of actions, where a covenant to sue was given in perpetuity and did not involve joint tortfeasors, it would be deemed to operate as a release, a complete and permanent bar to the underlying action. Simpson on Contracts (2d ed., 1965) 291. What then, is the conceptual distinction which differentiates a release from a covenant not to sue? A release is retrospective; a covenant not to sue, like any other covenant, is prospective. A release discharges an existing obligation or cause of action. The consideration for the release acts as a substitute for performance under the prior obligation; the obligation, thus satisfied, is extinguished and a cause of action can therefore no longer exist. 15 Williston on Contracts, 3d ed., s 1820; 5A Corbin on Contracts s 1238."*

375. Mr Cohen contended that this part of the judgment, which was the judgment of a trial level court, was in conflict with what had been said in the same case by a superior court, the Supreme Court, Appellate Division (First Department, New York); see *Colton v New York Hospital* 53 A.D.2d 588 (1976). In an earlier decision in the case, what I understand to have been the first instance court had denied the defendants' motion for summary judgment based on the release document and the plaintiffs' motion to strike out the defendants' defence based upon the release. The Appellate Division court decided that a preliminary hearing was required to determine the meaning and effect in law of the release document. As I understand the position, the preliminary hearing was the subsequent hearing, at trial level, in respect of which the judgment was given from which I have quoted above. In giving guidance on how the lower court should approach the exercise of construing the release document, the appeal court said this:

> *"Without intending to determine the ultimate issues, but merely to set forth some guidelines to aid in that determination, we observe that in general terms a covenant not to sue is an agreement by one having a present right of action against another*

not to sue to enforce such right. A covenant not to sue is not a release since it is not a present abandonment of a right or claim, but merely an agreement not to enforce an existing cause of action. Such distinction although technical is nevertheless clear. Thus, the party possessing the right of action is not precluded thereby from thereafter bringing suit; however, he may be compelled to respond in damages for breach of the covenant. In the instant case it does not clearly appear at present as to whether or not anything other than a possible right of action existed in favor of plaintiffs at the time of execution of the agreement."

376. Mr Cohen argued that the Appellate Division had made it quite clear, in this part of their judgment, that a covenant not to sue did not bar a suit, but instead gave rise to a right to claim damages for breach of the covenant.

377. In *Collins & Aikman Products v Sermatech Engineering Group* 297 A.D.2d 248 (2002) the Appellate Division (First Department, New York) concluded that claims in contracts should be dismissed and an award of damages vacated, on the basis that the claim violated forms of waiver which had been given by the plaintiff buyers of the manufacturing facilities which were the subject of the claim. The Appellate Division made reference to its earlier decision in *Colton v New York Hospital*, and stated that their *"fleeting dictum"* in *Colton* did not require a different result because:

"Neither the availability of damages for breach of a covenant not to sue, in general, nor the availability of damages in the form of attorneys' fees, in particular (see generally, Mighty Midgets v. Centennial Ins. Co., 47 N.Y.2d 12, 21, 416 N.Y.S.2d 559, 389 N.E.2d 1080), were at issue in that case."

378. I understood that the reference to *"fleeting dictum"* was equivalent to obiter dictum in this jurisdiction, and thus not part of what would be referred to in this jurisdiction as the ratio of the decision of the Appellate Division in *Colton*.

379. In *Apotex v Pfizer* 125 Fed.Appx. 987 (2005) the United States Court of Appeals, Federal Circuit, was concerned with an appeal against a judgment of a district court which had dismissed Apotex's declaratory judgment action for lack of jurisdiction. The appeal court vacated the hearing of the appeal and remanded the case with instructions for its dismissal, on the following basis:

"Less than one week before oral argument, Pfizer covenanted not to sue Apotex for infringement of U.S. Patent No. 4,743,450. A covenant not to sue, such as that provided by Pfizer, moots an action for declaratory judgment. See Amana Refrigeration, Inc. v. Quadlux, Inc., 172 F.3d 852, 855 (Fed.Cir.1999) ("[A] covenant not to sue ... is sufficient to divest a trial court of jurisdiction over a declaratory judgment action."). As a result, the judgment and opinion of the district court are vacated and the case is remanded with instructions to dismiss for lack of jurisdiction."

380. In cross examination Professor Kraus was referred to a further case which was said to be relevant. This was the decision of the Supreme Court, Appellate Division, First Department, New York in *Ridinger v West Chelsea Development Partners LLC* 150 A.D.3d 559 (2017). On examination however, it was clear that the facts of the case were distinguishable. The relevant issue in the case was whether the plaintiff could bring derivative claims on behalf of condominium unit owners, notwithstanding that she had given a covenant not to sue. It was held, perhaps not surprisingly, that the covenant not

to sue could not bar the claims brought in a derivative capacity, although it did expose the plaintiff to a possible claim for damages for breach of the covenant. The plaintiff's own personal claims were barred by a release which she had given, with the consequence that the court did not have to decide whether the covenant not to sue would also have barred the personal claims.

381. I confess that the case law to which I was referred does not give very clear guidance on this particular issue. It does however seem clear to me that the decision of the Appellate Division in *Colton* is not to be treated as authority for the proposition that a covenant not to sue cannot bar a suit, but can only give rise to a claim for damages. I do not think that the Appellate Division made a decision to this effect in their judgment in *Colton*. Equally, the subsequent statement of the law in *Colton*, by the trial level judge, does not seem to me to have contradicted any statement of the law in the Appellate Division. This position seems to me to be confirmed by the decisions in *Collins* and *Apotex*.

382. It would, in my judgment, be odd if New York law permitted a claim to proceed in defiance of a covenant not to sue, and in circumstances where a claim for damages for breach of the covenant not to sue would simply reflect the amount claimed in breach of the covenant not to sue. I found the evidence given by Professor Kraus in cross examination compelling in this respect. I find it hard to believe that a New York court would permit pointless litigation of this kind to take up court time and resources.

383. The Claimants' counsel argued, in their written closing submissions, that Professor Kraus had accepted in cross examination that a claim made in breach of covenant not to sue would proceed to trial, in the absence of a counterclaim for damages for breach of the covenant. It is however apparent from the relevant part of the cross examination (**[T4/69/14-21]**) that this is not what Professor Kraus accepted. What was accepted by Professor Kraus was this:

> *"Q. And where there's no cross claim for breach of the covenant not to sue, what's the position?*
> *A. I suppose the court would -- if the party suing in breach of the covenant not to sue proceeds, and the other side doesn't raise the defence, my guess is the court would say, you know, if the time has expired to raise that defence, then there is a point in going forth with it, of course."*

384. It is therefore quite clear that Professor Kraus was postulating a situation in which the breach of the covenant not to sue was no longer available as a defence to the relevant claim.

385. It does seem to me that the effect of a covenant not to sue, in any particular case, is capable of being case sensitive. I can see that there will be cases where it is clear that the relevant claim, brought in breach of the covenant not to sue, is an abuse, and that there may be cases where the position is more nuanced. In the framing of the fifth expert issue, there is an intermediate statement of the law, midway between the rival positions of Mr Cohen and Professor Kraus, to the effect that a covenant not to sue is a de facto bar to a claim made in breach of the covenant not to sue in almost all cases, given the circular nature of a counterclaim for damages in the same sum. In my view this intermediate statement of the law fits best with the case law to which I have been referred.

386. I therefore find, and conclude on the fifth expert issue, as a matter of New York law, that a covenant not to sue is, in practical terms, a bar to a claim made in breach of the covenant not to sue in almost all cases, given the circular nature of a counterclaim for damages in the same sum.

387. The sixth expert issue is whether the benefit of a release or a covenant not to sue is capable of assignment without an express statement of the right to do so. Mr Cohen asserted in his first expert report that there was such a rule in New York law. Professor Kraus did not accept that there was any such general rule. His opinion was that it was a matter of construction of the relevant release or covenant not to sue as to whether the benefit of such release or analysis could be assigned.

388. The problem with Mr Cohen's stance was that he was unable to identify any secure basis for such a general rule. The only case which Mr Cohen had been able to find which, as he claimed, directly addressed this question was *Russell v Marboro Books* 18 Misc.2d 166 (1959), which involved a release which, as construed by the judge in that case, did permit assignment. The judge stated that he was assuming, in respect of a release which did not give the right to assign, that rights acquired by virtue of and under the release could not be assigned. Mr Cohen acknowledged that this statement constituted the equivalent of an obiter dictum, as it was not directly addressed to the question before the court. Beyond this however, the statement in question seemed to me to beg the question of what was meant by the reference to a release which did not give the right to assign. There may be various reasons why the benefit of a particular release is not assignable, but I am doubtful that the judge's statement, obiter as it was, can be taken as support for a general rule that the benefit of a release or covenant not to sue is only capable of assignment if the relevant release or covenant so provides.

389. This point was further brought out by *Paige v Faure* 229 N.Y. 114 (1920), a further case relied upon by Mr Cohen in this context. All that this case does is to provide authority for the general rule that rights arising under a contract cannot be transferred if they are coupled with liabilities or if they involve a relationship of personal credit and confidence. As is apparent, this rule is similar in its content to the rules in this jurisdiction (i) that the burden of a contract cannot be assigned, in the absence of a novation of the contract between the parties to the contract, and (ii) that the benefit of certain categories of contracts, of a personal nature, cannot be assigned. It is however clear that *Paige v Faure* is not authority for a general rule that the benefit of a release or covenant not to sue cannot be assigned unless the release or covenant so provides. *Paige v Faure* simply identifies certain types of contract which are not capable of assignment. So far as I can see, and on the basis of *Paige v Faure*, the approach of New York law to the non-assignability of particular categories of contract is very similar to the law in this jurisdiction.

390. The same point can be made in relation to *Taylor Building Management Inc v Priority Payment Systems LLC* 91 A.D.3d 848 (2012), which was also relied upon by Mr Cohen in this context. Analysis of the judgment of the Appellate Division in this case demonstrates that it is, again, authority for the proposition that the burden of a contract cannot be assigned without the consent of the party entitled to enforce that burden. In the relevant part of the judgment the judges stated as follows (the underlining is my own):

> *"Priority moved to dismiss the complaint insofar as asserted against it, contending that the assignment of the contract terminated its obligations and liability under*

the Agreement. In an order dated February 1, 2010, the Supreme Court denied Priority's motion, holding that while the assignment of the Agreement to Global was valid, the assignment did not release Priority from liability under the Agreement. This was because, in order for the assignor (here, Priority) to be relieved from continuing liability after an assignment, the other contracting party (here, Taylor) not only had to consent to the assignment, but also had to accept the assignee (here, Global) in place of the assignor, thereby releasing the assignor (here, Priority) from liability under the Agreement. It is undisputed that Taylor did not consent to the assignment and did not accept Global in Priority's place. Accordingly, the Supreme Court held that the assignment did not release Priority from liability under the Agreement."

391. Mr Cohen also argued that a release of a claim of copyright infringement was equivalent to a copyright licence. The experts were agreed that at least some licences of this kind were not capable of assignment without express words authorising such assignment. This argument does no more however than establish a further category of contracts which are not capable of assignment. The existence of this category does not support the general rule contended for by Mr Cohen. Whether any particular release or covenant not to sue can be classified as a simple copyright licence, incapable of assignment, seems to me to depend upon an analysis of the relevant release or covenant.

392. Mr Cohen also argued, in his first expert report, that there was another reason for concluding that a release was not freely transferable, absent specific language to the contrary. He argued that any other rule would permit intolerable mischief. If the holder of a general release could simply sell the benefit of the release, this would prevent the releasor from enforcing their rights, for anything, anywhere, against anyone.

393. With due respect to Mr Cohen, there is an obvious flaw in this particular argument. A release can only release what it is expressed to release. If the benefit of release of a particular claim granted by A in favour of B is assigned to C, C cannot rely on the release as a defence to a claim which A may have against C in respect of an activity which is not the subject matter of the release. C can only rely on the release to the extent that C is carrying on an activity which is covered by the release and in respect of which the release provides a defence. Putting the matter another way, C can only rely upon the release to the extent that B could have done so. There is nothing abusive in C being able to rely on the benefit of the release in a situation of this kind.

394. I therefore find, and conclude on the sixth expert isssue, as a matter of New York law, that the benefit of a release or covenant not to sue is capable of assignment, even in the absence of a provision in the release or covenant which authorises such assignment. Whether there is any particular feature of the release or covenant which renders the same non-assignable, such as the personal nature of the release or covenant, depends upon analysis of the relevant release or covenant.

395. The seventh expert issue is whether the benefit of a covenant not to sue is personal and does not survive death. Subject to one particular point, to which I shall come, I can take this issue shortly. It was apparent from Mr Cohen's cross examination that there was no support in the authorities for the existence of such a rule. There may be particular features of a covenant not to sue which mean that the benefit of the covenant does not pass on the death of the covenantee. The most obvious example of this would be a provision in the

covenant providing that it should be personal to the covenantee and not capable of assignment. There is however no support in the authorities which were in evidence for a general rule to this effect. Effectively, my finding on this issue follows from my finding on the sixth expert issue.

396. I therefore find, and conclude on the seventh expert issue, as a matter of New York law, that the benefit of a covenant not to sue is capable of surviving death. Whether it does so in any particular case depends upon whether there is any particular feature of the covenant which has the effect that the benefit of the covenant is to be treated as personal to the covenantee.

397. The particular point to which I referred above relates to the framing of the seventh expert issue. In the list of expert issues the issue is identified in terms of the passing, on death, of the benefit of a covenant not to sue. The reference to the written expert evidence which is given in relation to this expert issue is to paragraphs 107-113 of Mr Cohen's first expert report. Paragraphs 108-113 are concerned with the transmission of the benefit of a covenant not to sue, where there is no specific mention of the right to assign. These paragraphs are therefore relevant to the sixth expert issue. Paragraph 107 deals with a separate topic; namely the transmission of the liability of a covenant not to sue. Mr Cohen's argument is that the burden of the liability under a covenant not to sue does not pass on death. In support of this argument Mr Cohen made reference to the decision of the Supreme Court (Albany County, New York) in *North Country Savings Bank v Nunziato* 123 Misc.2d 502 (1984), and to the earlier decision of the Supreme Court, Appellate Division (Third Department, New York) in *Tarantelli v Tripp Lake Estates Inc* 23 A.D.2d 905 (1965).

398. In *Tarantelli* the court was concerned with a covenant which was treated, for the purposes of the hearing, as a covenant to supply water between properties. The plaintiffs and the defendant were successors in title of the original covenantor and covenantee. So far as the running of the burden of the covenant was concerned, the court said this:

> *"Assuming arguendo the soundness of defendant's argument that the covenant is affirmative in nature, it does not necessarily follow that it is therefore unenforcible in an action against a subsequent grantee, as defendant contends. 'The burden of affirmative covenants may be enforced against subsequent holders of the originally burdened land whenever it appears that (1) the original covenantor and covenantee intended such a result; (2) there has been a continuous succession of conveyances between the original covenantor and the party now sought to be burdened; and (3) the covenant touches or concerns the land to a substantial degree.'"*

399. The court went on to differentiate the covenant from a personal covenant, not running with the land. In *North Country* the court referred to the above statement of the law in *Tarantelli* in the context of one of the arguments advanced by the petitioners, which was that it was well settled that covenants not to sue do not run with the land but are rather personal to the covenantors.

400. I mention this particular point, in relation to the seventh expert issue, because the cross examination of Mr Cohen proceeded on the footing that the above two cases did not support his argument that the liability of a covenant not to sue is personal and generally does not survive death. It was put to Mr Cohen that neither case contained a decision to that effect. In my view there was a confusion in this part of the cross examination, which

may not have been appreciated. The statement of the law in *Tarantelli* shows that the law of New York, regarding the running of the burden of covenants which touch and concern land, has similarities to the law in this jurisdiction. Under New York law the burden of a covenant can bind successors in title of the original covenantor, provided that the conditions identified in *Tarantelli* are satisfied. There is an interesting difference in the sense that it appears that the burden of a positive covenant, as well as a negative covenant, can run under New York law. It is also apparent from *Tarantelli* and *North Country* that the position in relation to covenants touching and concerning land falls to be contrasted with the position in relation to personal covenants, such as a covenant not to sue, where the burden of the covenant does not run to successors in title. This, in turn, would seem to be consistent with the principle of New York law which was accepted by both experts, namely that a liability under a contract cannot be assigned.

401. The Claimants have not sought, in the present case, to advance an argument of the kind relied upon in *Tarantelli* and *North Country* in relation to personal covenants. It follows that the particular point which I have just made is not relevant to what I have to decide. It does seem to me that the point should be recorded, if only in fairness to Mr Cohen and to clarify the apparent misunderstanding of what Mr Cohen was saying in paragraph 107 of his first expert report.

402. The eighth expert issue is the approach to worldwide restrictions in an agreement and, in particular, whether there is a principle, as Mr Cohen argued, that New York courts rarely find worldwide restrictions to be reasonable. In his evidence Mr Cohen acknowledged that there was a dearth of authority on this point. Mr Cohen relied on the case of *George & Co. LLC v Spin Master US Holdings Inc* (2023 WL 9509031) as authority for his proposition. The case was part of what the federal court (the United States District Court, E.D., New York) described as a *"decade-plus battle for trademark supremacy"* between the two companies involved in the dispute. The relevant trade marks related to a dice game which used specially marked dice and playing chips. The parties had both agreed to a settlement proposal by the court, but then proceeded to fall out over the geographical scope of the settlement, which was left undefined in the settlement. The court was asked to provide this definition. This created procedural difficulties concerning the ability of the court to decide the question of the geographical scope of the settlement, but ultimately the court agreed to resolve this question. The court ultimately decided that the settlement extended only to the United States and Canada. In reaching that decision the judge, in a lengthy judgment, relied upon the principle that New York courts rarely find worldwide restrictions reasonable *"in any context"*. It is important to quote in full what the judge said in the relevant part of the judgment:

> *"In sum, "New York courts rarely find worldwide restrictions reasonable in any context." Silipos, Inc. v. Bickel, No. 06-CV-2205, 2006 WL 2265055, at *6 (S.D.N.Y. Aug. 8, 2006). As result, the only way to give legal effect to the non-compete covenant in the Neutral's Proposal is to limit it geographically to the United States and Canada. E.g., Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC, 813 F. Supp. 2d 489, 507 (S.D.N.Y. 2011) ("In addition, the non-compete provision does not provide for any geographic limitations. Plaintiffs introduced no evidence to support the proposition that a covenant restricting competition of the kind at issue in this case, anywhere in the world, is reasonable in terms of scope; nor have Plaintiffs pointed to any cases in this jurisdiction that would support the Court drawing such a conclusion. Indeed, the case law suggests just the opposite."). And it is well-established that "where an otherwise valid*

restrictive covenant does not contain a geographic limitation, the court may ... interpret the clause in conformity with the intent of the parties." Crye Precision, 755 F. App'x at 38 (alteration in original) (quoting Deborah Hope Doelker, Inc. v. Kestly, 87 A.D.2d 763, 765 (1st Dep't 1982)). As such, the phrase, "Defendants agree not to sell any item with the term 'LCR,' " must by operation of law be limited, and here to only the United States and Canada."

403. It was put to Mr Cohen in cross examination that he had misread the case law and wrongly transposed case law from a wholly unrelated field; namely non-competition covenants. The *Silipos* case, which was cited in the extract from the judgment in *George* which I have just quoted, was also a case involving a non-compete covenant between employer and employee. I was not however persuaded by the Defendant's criticisms of this part of Mr Cohen's evidence. It is apparent from the extract from the judgment in *George* which I have quoted that the judge was not confining his statement that New York courts rarely find worldwide restrictions reasonable to the particular context of non-compete covenants. The judge used the words *"in any context"*. I also accept the Claimants' point that there is a similarity between the settlement agreement which was under consideration in *George*, and the present case, where the question is what effect the Releases had in relation to intellectual property rights.

404. Independent of these points, I found Mr Cohen's arguments in favour of a cautious approach to the question of whether a covenant not to sue has worldwide effect to be persuasive. A covenant not to sue is intended to have the effect of preventing a party from bringing what might otherwise be a legitimate claim before the court. I would expect any court, whether in New York or elsewhere, to adopt a cautious approach to the question of whether such a covenant had worldwide reach, in the absence of words making it clear that the covenant was intended to have this effect.

405. I therefore find, and conclude on the eighth expert issue, as a matter of New York law, that there is a principle that New York courts rarely find worldwide restrictions reasonable. I do not think that this principle is confined to non-competition covenants. I find that the principle is capable of wider application and, in particular, is capable of applying to covenants not to sue. I find that the New York courts would adopt a cautious approach to the question of whether a covenant not to sue had worldwide effect.

406. The ninth expert issue is whether a stipulation of discontinuance which is not signed by an attorney for one (non-settling) party is necessarily invalid and/or whether such a defect may be waived or cured by a manifestation of intent to do so.

407. As with the Claimants' reliance upon the fairly and knowingly made doctrine, the Defendant objected to the Claimants' reliance on the absence of signatures from the Discontinuances, on the basis that this absence of signatures had not been pleaded as a ground of invalidity of the Discontinuances. I will come to consider this pleading objection when I come specifically to consider the Discontinuances. For the moment, I consider the issue between the experts, without prejudice to my decision on the pleading objection.

408. The point on the absence of signatures from the Discontinuances arises because, as I understand the position, the Discontinuances were effected in reliance upon the method

of discontinuance set out in CPLR (Civil Practice Law and Rules) 3217(a)(2), which provides as follows:

> *"(a) Without an order. Any party asserting a claim may discontinue it without an order*
>
> *1. ……..*
>
> 2. *By filing with the clerk of the court before the case has been submitted to the court or jury a stipulation in writing signed the attorneys of record for all parties, provided that no party is an infant, incompetent person for whom a committee has been appointed or conservatee and no person not a party has an interest in the subject matter of the action; or"*

409. The problem which confronted the experts in relation to this issue was that there was agreed to be split in the authorities as to whether a failure of compliance with Rule 3217(a)(2) was, in all such cases, fatal to the validity of the relevant discontinuance filed in reliance upon this Rule.

410. Although a good deal of case law was considered in relation to this issue, I believe that I can take the issue fairly shortly. The reason for this is that both experts accepted, albeit not in the same terms, that there could be circumstances in which a failure of compliance could be cured.

411. Mr Cohen made reference to the decision of the Supreme Court, Appellate Division (Second Department, New York) in *Hanna v Ford Motor Co.* 252 A.D.2d 478 (1998). The case involved a discontinuance of a personal injury action, arising out an accident involving a van, where the discontinuance had been signed by the plaintiffs and by the van manufacturer. The discontinuance was a discontinuance of the action against the van manufacturer, but the discontinuance was not signed by the remaining defendants in the action. The point on failure of compliance with CPLR 3217(a)(2) was only raised for the first time on appeal, but the Appellate Division allowed the point to be taken, as a point of law. The judges decided that although there had been a failure of compliance with the rule, the discontinuance had been intended to release the Ford Motor Company, the van manufacturer, from the action and constituted a release within the meaning of the General Obligations Law. Mr Cohen's view was that this case demonstrated a discontinuance which failed to comply with the rule could still be treated as a release under the law of general obligations, provided that there was a manifestation of intent to that effect.

412. Professor Kraus put the matter more generally. His view was that a failure of compliance with Rule 3217(a)(2) was a matter which could be capable of waiver.

413. It is notable that some of the authorities referred to involved a consideration of whether a party had been prejudiced by the failure to comply with the rule; see in particular the decision of the Supreme Court, Appellate Division (Second Department, New York) in *CW Brown Inc v HCE Inc* 8. A.D.3d 520, where the judges said this, in the context of prejudice caused by failure to comply with the rule:

> *"Whatever reason ICOP had to discontinue the action against SICS, its effect was to prejudice Morse Diesel, which had a right to continue the deposition of the president of SICS, Kenneth Gordon, within 30 days of trial. We do not necessarily embrace the holding of the Appellate Division, Third Department case on which SICS relies, Barclays Bank of N.Y. v M & M Elecs. Assoc. (185 AD2d 580 [1992]),*

because it overlooks a substantive requirement of CPLR 3217 (a) and relegates its violation to a technical defect. Moreover, the court in Barclays overlooked the absence of one party's signature to a stipulation of discontinuance because no prejudice befell the party whose signature was lacking. Morse Diesel, in stark contrast, would be unfairly prejudiced in the loss of its ability to compel the conclusion of the deposition of the president of SICS, in which it had already invested substantial time and expense. Furthermore, the court had already ordered, and all parties had agreed, that the deposition would be concluded within 30 days prior to trial."

414. It seems clear to me, from the authorities, that Rule 3217(a)(2) imposes a procedural requirement, in relation to the filing of a discontinuance with prejudice, which has to be complied with if the discontinuance is to take effect as a discontinuance with prejudice. It was not clear to me, and the point may not matter, whether such a failure of compliance meant that the relevant discontinuance was completely ineffective, in the sense of not bringing the relevant action to an end as between the parties to the discontinuance, or whether failure of compliance simply meant that the discontinuance, while still effective to terminate the relevant action, did not take effect with prejudice, so as to be capable of giving rise to claim preclusion pursuant to the New York law principle of res judicata.

415. The authorities also seem to me to demonstrate that a failure of compliance may not be fatal to the validity of the discontinuance in a case where the discontinuance can be treated as a release or where it can be said that the requirement for compliance with the rule has been waived.

416. I therefore find, and conclude on the ninth expert issue, as a matter of New York law, that a stipulation of discontinuance which is not signed by an attorney for a party to the relevant action is not necessarily invalid. The defect may be waived, if there is evidence sufficient to support the existence of such a waiver. It may be possible to treat the discontinuance as a release, if there is sufficient evidence of an intention that the discontinuance should have this effect.

417. The tenth expert issue is whether, following a discontinuance with prejudice arising from a settlement agreement, the scope of res judicata extends to claims contemplated in the associated settlement agreement.

418. It is common ground between the experts that the New York courts use the transactional analysis to determine the scope of res judicata arising from a discontinuance. The res judicata principle applies both to claims which were litigated in the relevant action, and also to claims which could have been raised in the relevant action.

419. In this context Professor Kraus made reference to the decision of the United States Court of Appeals, Second Circuit, in *Nemaizer v Baker* 793 F.2d 58 (1986). The question which came before the Second Circuit in that case was whether the respondent to the appeal could bring an action in a federal court against the appellant for unpaid corporate employee benefit trust funds, after the respondent had previously stipulated to dismiss, with prejudice, an action raising that claim, which had been a state action. The appellant succeeded at district court level, but the Second Circuit reversed that result. In doing so, the judges analysed the position in the following terms:

"A dismissal with prejudice arising out of an agreement of the parties is an adjudication of all matters contemplated in the agreement, and a court order which memorializes this agreement bars further proceedings. Here appellant removed this case to the federal court on ERISA preemption grounds and alleged in his motion to dismiss in that court that ERISA precluded appellee's recovery. The district court ordered plaintiff's action dismissed with prejudice in accordance with the stipulation. Accordingly, res judicata precluded present appellees from raising the ERISA claim in a later federal suit. See PRC Harris, Inc. v. Boeing Co., 700 F.2d 894, 896 (2d Cir.), cert. denied, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983).

Appellees' complaint simply substitutes claims of ERISA violations for the previous claims of a violation of state labor law; it relies on the same operative facts. Because the identical facts pleaded in the prior state action form the basis for the new ERISA complaint, and the ERISA claim was in fact pleaded by appellant in the prior action (appellant's motion to dismiss and removal of petition), the stipulation dismissing plaintiff's "action" with prejudice must be read to have dismissed all claims. Res judicata principles preclude appellees from raising in a later action those claims that would have been decided had the first action been fully litigated. See Migra v. Warren City School District Board of Education, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); Murphy v. Gallagher, 761 F.2d 878, 879 (2d Cir.1985)."

420. In the experts' joint statement Mr Cohen took issue with the analysis by Professor Kraus of the effect of *Nemaizer*. His grounds for doing so were however that *Nemaizer* was a federal case. This is true, but it was apparent from evidence given in the first expert report of Professor Kraus that the New York doctrine of res judicata was the same as the federal law. In these circumstances I accept that a court in New York would apply the decision in *Nemaizer*.

421. I have some reservations in reading the reference to *"matters contemplated in the agreement"* in *Nemaizer* as a reference to any claim contemplated in an associated settlement agreement. I cannot help wondering whether the Second Circuit intended to go this far. A settlement agreement may range far and wide, in terms of the matters covered by the settlement, while one might expect a discontinuance with prejudice to operate only in relation to those claims which were or could have been litigated in the discontinued action. So far as I am aware however, this part of the evidence of Professor Kraus was only challenged in relation to the question of whether *Nemaizer* would be followed by a New York court. Professor Kraus was not challenged on the proposition that a dismissal with prejudice arising out of an agreement of the parties is an adjudication of all matters contemplated in the relevant agreement. I therefore accept the evidence of Professor Kraus that the principles of res judicata, as a matter of New York law, extend to claims contemplated in a settlement agreement associated with the relevant discontinuance.

422. I therefore find, and conclude on the tenth expert issue, as a matter of New York law that where there is a discontinuance with prejudice arising from a settlement agreement, the scope of res judicata extends to claims contemplated in the associated settlement agreement. There is however, I find, a need for some caution in identifying what qualifies as a claim contemplated in the associated settlement agreement. In particular, one needs to be able to identify a present claim or (if the settlement agreement is sufficiently widely

drafted to achieve this result) a future claim which is referred to in the settlement, as opposed to a settlement of something which is not correctly classified as an actual claim.

423. The eleventh expert issue is whether a subsequent change in the law, to recognise new legal rights following a settlement agreement operates as an exception to res judicata. Mr Cohen's position was that it was well-established, as a matter of New York law, that the res judicata doctrine does not apply if the later case is brought after an intervening change in the applicable legal context, even if the facts were otherwise part of the same transaction. A change in the substantive law negates the application of res judicata. Professor Kraus expressed the view, in his expert report, that res judicata could extend to a claim based upon future legal rights; that is to say a claim based on legal rights which did not exist when the settlement agreement was entered into pursuant to which a discontinuance with prejudice was effected.

424. Mr Cohen relied upon three authorities in support of his position. The first of these cases was *John P v Whalen* 54 N.Y.2d 89 (Ct. App. 1981), a decision of the Court of Appeals of New York. The case was concerned with a freedom of information request made by a doctor. One of the issues in the case was whether the request was barred by res judicata, on the basis that the doctor had previously made what was essentially the same request, in respect of which the doctor's petition to the court had failed. The Court of Appeals affirmed the decision of the first instance court on this issue, which was that the new request could be entertained because the relevant freedom of information legislation had changed. The reasoning of the Court of Appeals on this issue was expressed in the following terms:

> *"The commissioner's invocation of res judicata is without basis. It is, of course, true that if both requests are viewed as being a single proceeding, the dismissal for failure to prosecute of petitioner's first appeal would bar him from now seeking review of the same issues (see* *****120*** *Bray v. Cox, 38 N.Y.2d 350, 379 N.Y.S.2d 803, 342 N.E.2d 575 [dismissal for failure to prosecute interlocutory appeal on choice-of-law issue precluded its consideration on appeal after final judgment]). However, petitioner's first request for information was made under the 1974 version of the Freedom of Information Law. The 1977 act materially changed the parties' rights in that it accorded to the agency the discretion to provide access to sensitive information rather than excluding it entirely (compare Public Officers Law, § 87, subd. 2, with former § 88, subd. 6, as enacted by L. 1974, ch. 578, § 2), and by placing on the agency the burden of proving the propriety of denying access to information (compare Public Officers Law, § 89, subd. 4, par. [b], with former § 88, subd. 7, as enacted by L. 1974, ch. 578, § 2).*
>
> *The request now being reviewed is, thus, a separate and independent request made pursuant to the new law. As such, it is a "transaction" wholly distinct from the first request. Consequently, applying the transactional analysis approach to res judicata questions adopted in this State (see Matter of Reilly v. Reid, 45 N.Y.2d 24, 29, 407 N.Y.S.2d 645, 379 N.E.2d 172; Restatement, Judgments 2d [Tent Draft No. 5], § 61), the parties are not bound by the determination made on petitioner's first request."*

425. It will be noted that this case was one where the argument of res judicata was not based upon a previous settlement, but rather upon a previous decision of the court, which was followed by a change in the relevant law. The same was true of the other two cases relied upon by Mr Cohen in this context; namely *North Manursing Wildlife Sanctuary Inc v*

City of Rye 48 N.Y.2d 135 (Ct. App. 1979) and *American Bible Soc v Lewisohn* 40 N.Y.2d 78 (Ct. App. 1976).

426. The Defendant argued that these cases were not authority for the proposition spoken to by Mr Cohen because they involved previous judgments given on the merits of the case, which could subsequently be relitigated because the law had changed.

427. I do not think the position is quite as straightforward as this. It seems to me that the question of whether the doctrine of res judicata applies, following a discontinuance with prejudice, to a claim which did not exist or was not feasible at the time of the discontinuance, as a result of a change in the law, depends upon an analysis of the claims which were settled by the discontinuance. I can see that a subsequent change in the law may constitute a good reason for deciding that a subsequent claim, although based on the same facts as the claims settled by the discontinuance, is not caught by the res judicata doctrine. Alternatively, the scope of the discontinuance may be sufficient to extend to the new claim. It seems to me that all depends upon the scope of the relevant discontinuance, in which respect the authorities relied upon by Mr Cohen, although not directly on point, may offer some guidance.

428. I therefore find, and conclude on the eleventh expert issue, as a matter of New York law, that a subsequent change in the law to recognise new legal rights, following a settlement agreement, may be a reason for saying that the doctrine of res judicata does not apply to a subsequent claim based upon those new legal rights. Whether the subsequent change in the law does have this effect depends upon the scope of the relevant discontinuance.

429. The twelfth expert issue is whether the copyright claim was in fact raised by the Historical New York Claims. I find it convenient to take this twelfth issue with the thirteenth expert issue, which is whether the copyright claim could have been raised in the Historical New York Claims. Both issues raise essentially the same issue, which is not an easy one to decide.

430. I use the lower case to refer to *"the copyright claim"* because it was not entirely clear to me whether the reference to "the copyright claim" in the list of expert issues was meant to refer specifically to the Copyright Claim, that is to say the claims made in these proceedings in relation to the Copyrights, or whether the copyright claim refers more generally to a claim in respect of the Copyrights. For the reasons which I shall explain, I do not think that this distinction is a critical one. I will approach these two issues on the basis that I am considering the question of whether a claim in respect of the Copyrights was or could have been raised in the Historical New York Claims.

431. At first sight it is not easy to see how the copyright claim either was or could have been raised in the Historical New York Claims. Both the Accounting Claim and the Supreme Court Claim were concerned with a dispute between the Band Members, subject to the fact that Jimi Hendrix was dead, with the consequence that his interests were represented by the Hendrix Estate. Mr Redding and Mr Mitchell were seeking payment of what they claimed was due to them by way of the earnings of JHE. The hypothesis which applies to my consideration of the Releases and the Discontinuances is that, contrary to my previous decision, the Band Members were the first owners of the Copyrights. As such, it is not, at first sight, easy to see how either the Accounting Claim or the Supreme Court Claim engaged any issues relating to ownership of the Copyrights, let alone infringement

of the Copyrights. This appears to be confirmed by the amended complaint in the Supreme Court Claim, a copy of which I have seen. So far as I can see, the amended complaint makes no reference, or at least no express reference to the ownership or infringement of any copyright.

432. The position is not however as simple as this. In his report Professor Kraus analyses the claims which were made in the Accounting Claim and the Supreme Court Claim. As he explains, in each set of proceedings it would have been necessary for the respective New York courts to have made a decision on who owned the Copyrights, in order to determine whether and, if so, what income would be due to the Band Members going forward; see in particular paragraphs 105-107 and 114-117 of the first report of Professor Kraus. The working hypothesis, in this context, is that the Band Members were the first owners of the Copyrights, but in my view this hypothesis does not mean that one treats the question of ownership of the Copyrights as being settled, and thus incapable of argument in the Historical New York Claims.

433. The Claimants argued that the claims for financial relief which were made in the amended complaint were backward looking, and did not extend to claims in the future. The significance of this point, as I understood it, was that during the continuance of the Recording Agreement, the right of the Band Members to payment arose under clause 8 of the Recording Agreement. It was only after clause 8 ceased to have effect that the right of Band Members to a share of any earnings from the Recordings and the Performances would depend upon what rights they could assert over the Recordings and the Performances. As such, so the Claimants argued, questions of copyright could not have arisen in the Historical New York Claims.

434. I have subjected the amended complaint in the Supreme Court Claim to a careful reading. I have also looked carefully at the documents filed on behalf of Mr Redding and Mr Mitchell in the Accounting Claim. In my view the claims made by Mr Redding and Mr Mitchell in both of the Historical New York Claims were widely enough framed to extend to future earnings from the Recordings and the Performances. I do not consider that they were confined to backward looking claims.

435. This seems to me to justify the following conclusion. In order to resolve the Historical New York Claims, it would have been necessary to consider what rights the Hendrix Estate, Mr Redding and Mr Mitchell had in respect of the music of JHE going forward. This would have included rights in the Recordings and, for that matter, the Performances. It would have been necessary to address who owned what rights, and in what shares (if the rights were not owned individually), and what income those rights might yield.

436. I can see the force of the arguments, advanced by the Claimants, to the effect that the Copyright Claim is fundamentally different to the questions raised in the Historical New York Claims. The Copyright Claim may be described as outward facing. The Claimants are saying that the Band Members were the first owners of the Copyrights and that they, by succession, have part-ownership of the Copyrights. The Claimants are further saying that the Copyrights have been infringed by the Defendant. On this basis, it can be said, there is no relevant overlap between the Copyright Claim and the Historical New York Claims.

437. I am not however persuaded by these arguments. It seems to me that if one subjects the Historical New York Claims to a careful analysis, as Professor Kraus has done, it can be seen that, if they had gone to trial, they would have engaged the same questions as those which essentially underlie the Copyright Claim; namely the ownership of the Copyrights and the value of the Copyrights.

438. In this context the Claimants sought to rely further upon the judgment of Arnold LJ in the Court of Appeal in this action (*Noel Redding Estate Limited v Sony Music Entertainment UK Limited* [2025] EWCA Civ 66), to which I have referred earlier in this judgment. The second ground upon which the Defendant challenged the partial refusal of the strike out application by Michael Green J was that the Copyright Claim amounted a claim to a share of the assets of the partnership which had been constituted, between the Band Members, in the form of JHE. On this basis the Defendant argued that the Copyright Claim was an action for an account which, by virtue of Section 23 of the Limitation Act 1980, could only have been brought within six years of the dissolution of the partnership, with the consequence that the Copyright Claim was statute barred. Michael Green J rejected this contention on the basis that the Copyright Claim was not a claim to a share of the partnership assets.

439. Arnold LJ agreed. As he explained in his judgment, at [62], the Copyright Claim was an external claim against the Defendant, in respect of which the relationship between the formers partners was irrelevant:

> *"62. In the present case the Claimants' copyright claim is a claim by two of the former partners of JHE against Sony, which was never a partner. It is therefore the external perspective that matters, and from that perspective the relationship between the former partners is irrelevant. Even viewed from the internal perspective, however, this is not a claim to a share of partnership assets. On the Claimants' case the legal title to the copyrights has either always been, or since 1974 been, jointly owned by Hendrix, Redding and Mitchell or, since their deaths, their respective successors in title. During the partnership, Hendrix, Redding and Mitchell will have held the legal titles as partnership assets. Upon the dissolution of the partnership, any of them (or in Hendrix's case, his estate) could have insisted upon the legal titles being sold and the net proceeds being applied towards payment of any debts and liabilities with any surplus being distributed. There is no suggestion that this happened, however. By virtue of section 23 of the 1980 Act it is now far too late for any partner (or their successor in title) to bring an action for an account so as to force a sale, accounting and distribution. Thus legal title to the copyrights remains, on the Claimants' case, jointly owned by the partners' respective successors in title. There is no claim that the beneficial title is held differently."*

440. The Claimants relied upon this extract from the judgment to argue that there was no reason for the Copyrights to be in issue in the New York Historical Claims. The shares in the Copyrights of Mr Redding and Mr Mitchell, if they and Jimi Hendrix had been first owners of the Copyrights, were not held by the Hendrix Estate and were not the subject of a claim to part-ownership of the Copyrights. If the Band Members were the first owners of the Copyrights, the question of ownership of the Copyrights was settled by their partnership agreement.

441. I do not think that the reasoning of Arnold LJ, as quoted above, can be transposed to the expert issues which I am considering in this context. Arnold LJ was concerned with the question of whether the Copyright Claim could be characterised as a claim for an account, which it could not, whether viewed from an external perspective or an internal perspective. I am concerned with the question of whether there is an overlap between the Copyright Claim and the Historical New York Claims. More specifically, the question is whether issues regarding the ownership of the Copyrights and their value arose or could have arisen in the Historical New York Claims. For the reasons identified by Professor Kraus, it seems to me that those issues did arise, or at least could have arisen in the Historical New York Claims.

442. Returning to the specific expert issues with which I am dealing, it seems to me it would be wrong to say that a set of claims corresponding to the Copyright Claim either were or could have been raised in the Historical New York Claims. There were the differences to which I have referred above. Nevertheless, it seems to me that the questions which underlie the Copyright Claim were in fact raised in the Historical New York Claims, and would have had to be addressed if the Historical New York Claims or either of them had gone to trial.

443. I therefore find, and conclude on the twelfth and thirteenth expert issues, as a matter of New York law, that the question of the ownership of the Copyrights, and the question of what that ownership was worth, in terms of future earnings, were raised, or at least could have been raised in the Historical New York Claims.

444. The fourteenth and final expert issue of New York law is whether a New York court would examine parol evidence as to the identity and authority of a party, in order to resolve ambiguity as to the parties to an agreement. I am doubtful that anything turns on this issue. My understanding is that this issue arose in relation to the dispute over the Defendant's chain of title from the Producers. It will be recalled that the Claimants took a point as to the identity of the assignee in the agreement of 22nd October 1969, which was entered into between the Producers and the J&C Company. I was able to decide this point without the necessity of looking outside the agreement itself.

445. In case however this final expert issue does matter, my finding and conclusion, as a matter of New York law, is that parol evidence may be used to resolve an ambiguity as to the parties to an agreement. If the ambiguity cannot be resolved by resort to parol evidence, the question of whether the relevant agreement is thereby rendered unenforceable depends upon the effect, if any, of the ambiguity upon the relevant agreement.

446. With the above principles of New York law in mind, both as agreed between the experts and, in the case of expert dispute, as I have determined those principles, I turn to my consideration of the effect, if any, of the Releases and the Discontinuances upon the Claims.

<u>If Mr Redding was a part-owner of the Copyrights, as first owner, what were the meaning and effect of the Redding Release in relation to the Copyright Claim?</u>

447. Before I come to my analysis of the Redding Release, it seems to me that I should, first, deal with the fairly and knowingly made doctrine, given the Claimants' argument that it applies to the construction of the Redding Release. There are two points to make in this context.

448. First, I have already concluded, in my consideration of the expert issues, that the fairly and knowingly made doctrine does not apply to the construction of the Redding Release. There is no claim by the Claimants to set aside the Releases or the Discontinuances. Accordingly, the fairly and knowingly made doctrine can be disregarded.

449. Second, I have already made reference to the Defendant's initial pleading objection, in response to the Claimants' reliance upon the fairly and knowingly made doctrine. The Defendant argued that the Claimants should not be permitted to rely upon the doctrine because they had not pleaded a case that the Redding Release should be construed in any particular way, by reason of the application of the fairly and knowingly made doctrine. Logically, this pleading objection comes before the question of New York law which has arisen in this context. In my view I should state briefly my decision on the pleading objection, whether or not it is strictly necessary to do so.

450. In my view there is merit in the pleading objection. It seems to me that if the Claimants had wanted to say that the Redding Release should be read in a certain way, on the basis of the application of the fairly and knowingly made doctrine, it was incumbent upon them to plead the relevant facts which were said to engage this doctrine. In other words, the Claimants needed to plead their case that Mr Redding did not enter into the Redding Release on a fairly and knowingly made basis. This might not have been an easy argument for the Claimants, given that it is clear from the terms of the Redding Release that Mr Redding had the benefit of legal advice and representation when he entered into the Redding Release. This is however beside the point for present purposes. The relevant point is that, in my view, the relevant facts needed to be pleaded in support of the Claimants' case that the doctrine applied to the construction of the Redding Release. The relevant facts were not pleaded. It seems to me that this was clearly to the prejudice of the Defendant, which was left in a position where it did not know the factual case which it had to meet in this respect. Nor was there any application to amend in this respect.

451. In these circumstances, and if the fairly and knowingly made doctrine had been capable of applying to the construction of the Redding Release, I would have concluded that the Claimants should not, given the absence of the required pleading, be permitted to pursue the argument that the fairly and knowingly made doctrine applied to the construction of the Redding Release.

452. There is one other preliminary point to be made, before I come to the terms of the Redding Release. It seems to me that the Redding Release cannot be construed by reference to the Mitchell Release, or vice versa. On the available evidence, each of the Releases was an independent contract, made between the parties to that contract. There is no evidence that the Releases were negotiated and agreed as part of an overall settlement involving all parties to the Historical New York Claims. As such, I do not consider it legitimate to construe either Release by reference to the terms of the other Release.

453. This clears the way for my analysis of the terms of the Redding Release. The experts have confirmed that the recitals to a release may assist in determining the scope of the release. Accordingly, I consider first the recitals.

454. The first recital clearly ties the subject matter of the Redding Release to Mr Redding's previous performances as a professional musician, as part of JHE. The second recital identifies what was meant by performances, specifically including recording sessions and, as separate categories, (i) performances which were recorded and (ii) personal appearance performances which were filmed. The performances referred to in the second recital clearly included the Performances. Equally, the reference to the recording sessions clearly included the Recordings.

455. The third and fourth recitals then identify the claims which were being settled by the Redding Release.

456. Moving to clause 1, it effectively contained three different provisions, in each of the three sentences of the clause. The first provision is a release of all liability or responsibility to account for any royalties or compensation in connection with recordings of Jimi Hendrix on which Mr Redding performed. It seems to me that this reference to recordings must include the Recordings, which were recordings of Jimi Hendrix on which Mr Redding also performed. The release is expressed to be granted to a number of parties, including the Hendrix Estate. The release clearly related to future earnings, as well as past earnings. The reference is *"any and all liability or responsibility to me* [Mr Redding] *to account for any royalities* [royalties] *or compensation in connection with the said recordings."*. I do not think that the release extended to record companies which might enter into contracts with the Hendrix Estate in the future. It seems to me that the contracts referred to in the first sentence of clause 1 were those already entered into. This does not however alter the fact that the release made unqualified reference to royalties and compensation, both in the future and in the past.

457. The second sentence of clause 1 then contains a covenant not to sue in respect of the same subject matter.

458. This leaves the third sentence of clause 1. The third sentence contains an acknowledgment of receipt of full settlement of *"any compensation which I may claim in connection with earnings on said recordings in the past, as well as any earnings which might result in the future, both in the United States and throughout the rest of the world."*. This acknowledgment is very broadly expressed. The only limitation on this provision is the reference to *"said recordings"*, but this clearly refers back to *"recordings of JIMI HENDRIX on which I performed"*. It does not seem to me that this reference is tied to recordings which were the subject matter of the contracts referred to in the first sentence of clause 1. Putting the matter another way, it does not seem to me that this reference relates only to compensation payable in respect of the existing contracts referred to in the first sentence of clause 1. Effectively, it seems to me that the third sentence of clause 1 is a further release in relation to past and future earnings from recordings and performances which included the Recordings and the Performances. It is also clear that the earnings referred to were past and future earnings on a worldwide basis.

459. Moving to clause 2, the first sentence is concerned with the Warner Brothers film, and is not relevant. The second sentence contains however an assignment to the Hendrix Estate of *"all right to grant consent for the use of my likeness and sound which may have been filmed and recorded at any time in connection with my performance as a part of the ARE YOU EXPERIENCED group in conjunction with the performance of JIMI HENDRIX."*. Again, this is a very broad provision. It constitutes an assignment of all rights (it seems

to me that the plural *"rights"* can be inferred) to grant consent. The Claimants argued that this second sentence must also be referring to consent in relation to the Warner Brothers film. I can see the force of this argument, given the reference to the film in the first sentence of clause 2, and given the reference to *"filmed and recorded"*, which might be said to mean only those performances which were both filmed and recorded, as opposed to those performances which were filmed and/or recorded. The words *"and/or"* are not used in the second sentence.

460. I am not however persuaded by this argument, for three reasons. First, the remainder of the wording of the second sentence is very broad. It is not expressed to be tied to the film, which is what one might have expected, if this had been the intention. In particular, the reference is to filming and recording *"at any time"* in connection with Mr Redding's performances with JHE. Second, the first preamble identifies a number of separate categories of performances, including recording sessions, performances which were recorded and performances which were filmed. This does not fit easily with filming and recording being a joint single category in the second sentence of clause 2. Third, the film is dealt with in the first sentence of clause 2, in respect of which a release was granted to the Hendrix Estate and Warner Brothers. The second sentence of clause 2 contains an assignment only to the Hendrix Estate. It is not easy to see why this assignment was required by the Hendrix Estate in relation to the film, when the position in relation to the film had been dealt with in the first sentence. The more natural reading of the second sentence is that the assignment was general in its nature.

461. This leaves the third sentence of clause 2, which contains a covenant not to sue, for the benefit of the Hendrix Estate, which is expressed in effectively unqualified terms. It applies to all performances of Mr Redding with JHE.

462. The breadth of the provisions which I have identified above is confirmed by clause 3, which makes it clear, if this was required, that the Redding Release applies to recordings released or remastered in the future, in addition to those already released, and applied to *"world-wide rights"*. This is supported by clause 4 which states Mr Redding's agreement to *"enter dismissals with prejudice and stipulations for discontinuance of all and any actions"* which Mr Redding had *"heretofore caused to be filed in any court in any jurisdiction of the world."*.

463. Finally, there is the rider to the Redding Release, which confirms that the Redding Release does not affects claims against Yameta. In the light of my findings in relation to Yameta, earlier in this judgment, I cannot see that the exception of claims against Yameta is material to my construction of the remainder of the Redding Release.

464. It seems to me that the provisions of the Redding Release which I have identified above have a material effect on the Copyright Claim. I say this for the following reasons.

465. The starting point is the width of the language of the Redding Release. I accept the Defendant's submission that the Redding Release was clearly intended to compromise every possible claim and right which Mr Redding might have in relation to his participation in JHE including, in particular, in relation to his performances with JHE. This emerges from the provisions in the first and third sentences of clause 1 and the second and third sentences in clause 2.

466. The next point is that the experts were agreed that, if and to the extent that a release was expressed to apply to future claims, as opposed to present claims, it took effect as a covenant not to sue, rather than a release. Given that the Copyright Claim was, at the time of the Redding Release, a future claim, it seems to me that those clauses in the Redding Release which contained releases have to be considered as covenants not to sue. In practical terms, this means that the releases in the first and third sentence of clause 1 of the Redding Release, so far as they applied to future earnings, fall to be treated as covenants not to sue.

467. Turning then to the specific provisions within the Redding Release, the second sentence of clause 2, as I construe the same, contained an assignment by Mr Redding to the Hendrix Estate of all right to grant consent for the use of Mr Redding's sound which had been recorded at any time in connection with the performances as part of JHE. On this basis the assignment clearly included the Recordings. The Hendrix Estate was being granted the sole authority to exercise the right to grant or withhold consent in relation to all future exploitation of the Performances, so far as they involved Mr Redding, as contained in the Recordings. Whatever the correct classification of this assignment, it seems to me that it clearly precluded Mr Redding from asserting any rights over the Recordings, as against the Estate or anyone authorised by the Estate.

468. There is then the covenant not to sue in the third sentence of clause 2, and the releases of the Hendrix Estate in the first and third sentences of clause 1 which, for the reasons which I have explained, also fall to be treated as covenants not to sue. In my view all three of these covenants not to sue clearly include any rights which might be claimed in respect of the Recordings and the Performances, including any future financial claim in respect of the Recordings or the Performances. If the Recordings or the Performances were not included within the scope of each of these covenants, the relevant provisions do not make sense. Each covenant is framed in the widest possible terms, with no qualifying words which could operate to exclude the Recordings or the Performances.

469. I do not think that the Copyrights can be treated as being excluded from the scope of this assignment on the basis that they were UK rights. I say this for three reasons. First, clause 3 made it clear that the Redding Release went to world-wide rights. Second, there is the reference to worldwide earnings in the third sentence of clause 1. Third, even if the Redding Release had not contained these provisions, I find it very difficult to see how the Redding Release, which was clearly expressed to include the Recordings within the scope of the settlement terms in the Redding Release, could be read as excluding the Copyrights. To do so effectively deprives the Redding Release of a substantial part of its effect, without any wording which suggests that the Redding Release was to be qualified in this way. In summary, it seems clear to me that the Redding Release was intended to include, and did include all and any rights which Mr Redding had or might in the future have in the Recordings and, although this is not directly relevant for present purposes, in the Performances.

470. I refer back to my findings and conclusion on the eighth expert issue, which concerns the approach of the New York courts to the question of whether restrictions in an agreement are worldwide in their effect. I have accepted Mr Cohen's evidence that there is a principle that New York courts rarely find worldwide restrictions to be reasonable, and thus adopt a cautious approach where this question arises. In the present case however, there is clause 3 of the Redding Release. There is also the reference to worldwide

earnings in the third sentence of clause 1. There are also, as explained in my previous paragraph, good reasons for thinking that the Redding Release was intended to cover rights on a worldwide basis. In my view this is sufficient to justify, even on a cautious approach, the conclusion that the Redding Release was intended to have effect on a worldwide basis.

471. Equally, I cannot see that there was anything in the Redding Release which served to restrict either the assignment or the covenants not to sue to particular methods for the delivery of the music contained in the Recordings. The wording was unqualified.

472. The Claimants argued strongly that neither of the Claims could have been encompassed within the terms of the Releases. So far as the Copyright Claim was concerned, so they argued, the claims made in the Copyright Claim bore no relation to what was at issue in the Historical New York Claims. So far as the PPR Claim was concerned, so they argued, it was legally impossible for the PPR Claim to have been encompassed within the terms of the Releases, in circumstances where it did not exist at the time of the Releases, and would not exist for many years to come.

473. It seems to me that there are a number of answers to these arguments. I will deal with the PPR Claim in the next section of this judgment. For present purposes, I confine myself to the Copyright Claim. I have already identified the overlap between the subject matter of the Copyright Claim and the subject matter of the Historical New York Claims, in my findings and conclusions on the twelfth and thirteenth expert issues. Independent of this, and for the reasons which I have just set out in my analysis of the Redding Release, the terms of the Redding Release were widely expressed and included those rights which Mr Redding had or might have in relation to the Recordings, including the Copyrights. In these circumstances I cannot accept the distinction which the Claimants seek to establish between the Copyright Claim and the claims which were the subject of the Releases.

474. The Claimants also sought to argue that the claim for declaratory relief could not be precluded by the Releases in any event. I do not follow this argument. If rights and/or claims of Mr Redding in respect of the Recordings were included within the terms of the Redding Release, I cannot see why the provisions in the Redding Release do not extend to claims for declaratory relief in relation to the Copyrights, just as much as they extend to claims for compensation for alleged infringement of the Copyrights.

475. It is convenient, at this point, to consider the question of whether the covenants not to sue in the Redding Release would actually have acted as a bar to a claim by Mr Redding for infringement of the Copyrights against the Hendrix Estate. I have already set out my findings and conclusion on the fifth expert issue, which is concerned with the effect of a covenant not to sue. I have found, and concluded, as a matter of New York law, that a covenant not to sue is, in practical terms, a bar to a claim made in breach of the covenant not to sue in almost all cases, given the circular nature of a counterclaim for damages in the same sum. As against the Hendrix Estate therefore, I conclude that the covenants not to sue would have operated as a practical bar to any attempt by Mr Redding to sue the Hendrix Estate for infringement of the Copyrights.

476. Drawing together all the above analysis, my conclusions as to the meaning and effect of the Redding Release in relation to the Copyright Claim, on the assumption that Mr Redding was a part-owner of the Copyrights, are as follows:
    (1) The Redding Release contained an assignment by Mr Redding to the Hendrix Estate of authority to grant consent for the exploitation of the Recordings and the Performance. This had the effect of precluding a claim by Mr Redding for infringement of the Copyrights against the Hendrix Estate or anyone authorised to exploit the Recordings and the Performances by the Hendrix Estate.
    (2) The Redding Release contained covenants not to sue which had the effect of precluding a claim by Mr Redding, either in relation to ownership of the Copyrights or in relation to infringement of the Copyrights, against the Hendrix Estate.

477. It will be noted that I have expressed the above conclusions by reference to the position of the Hendrix Estate, if it had been confronted with the equivalent of the Copyright Claim. There are further issues to consider in order to determine whether the Defendant can rely upon the Redding Release, in relation to the Copyright Claim, to the same extent as the Hendrix Estate could have done so.

What were the meaning and effect of the Redding Release in relation to the PPR Claim?

478. I can take this question much more shortly, because I have already been through my analysis of the construction and effect of the Redding Release.

479. At the time of the Redding Release the PPRs did not exist, nor did anything equivalent to the PPR Claim exist. I refer however to my findings and conclusions on the first and second expert issues. In particular, I have concluded that the test which the New York courts would apply, in determining whether a release or covenant not to sue applied to intellectual property rights coming into force after the relevant agreement would be analogous to the approach of the New York courts which emerges from the new use jurisprudence. The question would therefore be one of construction of the relevant agreement, in order to determine the true scope of the release or covenant not to sue.

480. Applying this approach to the Redding Release, it seems to me quite clear that the relevant provisions in the Redding Release were amply wide enough to include the acts of exploitation of the Performances covered by the PPRs. The assignment provision in the second sentence of clause 2 was the assignment of the right to grant consent for the use of Mr Redding's performances as part of JHE. There were no limitations on this right. It was a right which included the Performances and which permitted the Hendrix Estate to grant consent for the use of the Performances, so far as they involved Mr Redding. No limitation was expressed in respect of that use.

481. Turning to the various covenants not to sue in the Redding Release, they were also unqualified. They clearly included any earnings of Mr Redding from the Recordings and the Performances.

482. The above analysis seems to me to supply the answer to the Claimants' arguments that the PPR Claim could not possibly have been included in the terms of the Releases, because the PPR Claim did not then exist, and would not exist for many years to come. This argument assumes that the Releases were required to make specific reference to claims in respect of the PPRs. In my view this is not the correct analysis of the Releases. Dealing specifically with the Redding Release, its terms were sufficiently wide to include

rights and/or claims of Mr Redding in respect of the Performances. In these circumstances, and as with the Copyright Claim, I cannot accept the distinction which the Claimants seek to establish between the PPR Claim and the claims which were the subject of the Releases. Further, and as with the Copyright Claim, I cannot see why the provisions in the Redding Release do not extend to claims for declaratory relief in relation to the PPRs, just as much as they extend to claims for compensation for alleged infringement of the PPRs.

483. I have already set out my conclusions on the worldwide nature of the provisions of the Redding Release.

484. In relation to the PPR Claim there is also the Claimants' argument that an enhanced standard of consent was required, in relation to activities subject to the PPRs. I have however already dealt with this argument, in an earlier section of this judgment. Consistent with my earlier analysis, I have approached the question of whether the Releases contained provisions which restricted or precluded the ability of Mr Redding and Mr Mitchell to rely upon the PPRs (i) on the basis that intellectual property rights are subject to a high level of protection, and (ii) mindful of the need for clear and explicit statements in the Releases to the effect that the rights subsequently embodied in the PPRs were being compromised. Indeed, the New York case law imposes equivalent requirements for such clear and explicit statements in releases and covenants not to sue. In my view however, and for the reasons which I have explained, such clear and explicit statements can be found in the Redding Release.

485. Drawing together the above analysis, and the relevant parts of the analysis in the previous section of this judgment, my conclusions as to the meaning and effect of the Redding Release in relation to the PPR Claim are as follows:
    (1) The Redding Release contained an assignment by Mr Redding to the Hendrix Estate of authority to grant consent for the exploitation of the Recordings and the Performance. This had the effect of precluding a claim by Mr Redding for infringement of the PPRs against the Hendrix Estate or anyone authorised to exploit the Recordings and the Performances by the Hendrix Estate.
    (2) The Redding Release contained covenants not to sue which had the effect of precluding a claim by Mr Redding for infringement of the PPRs against the Hendrix Estate.

486. I have, again, expressed the above conclusions by reference to the position of the Hendrix Estate, if it had been confronted with the equivalent of the PPR Claim. As with the Copyright Claim, there are further issues to consider in order to determine whether the Defendant can rely upon the Redding Release, in relation to the PPR Claim, to the same extent as the Hendrix Estate could have done so.

<u>If Mr Mitchell was a part-owner of the Copyrights, as first owner, what were the meaning and effect of the Mitchell Release in relation to the Copyright Claim?</u>

487. I have already dealt with the Claimants' argument that the fairly and knowingly made doctrine should apply to the construction of the Redding Release. It seems to me that the position is the same with the Mitchell Release, with the consequence that the fairly and knowingly made doctrine can be disregarded, both on the basis of the failure to plead the Claimants' case in this respect, and on the basis that the doctrine does not apply in any event to the construction of the Mitchell Release. I can therefore move straight to my

analysis of the terms of the Mitchell Release. As with the Redding Release, I consider first the recitals.

488. In common with the Redding Release, the first recital clearly ties the subject matter of the Mitchell Release to Mr Mitchell's previous performances as a professional musician as part of JHE. The second recital identifies what was meant by performances, specifically including recording sessions and, as separate categories, (i) performances which were recorded and (ii) personal appearance performances which were filmed. The performances referred to in the second recital clearly included the Performances. Equally, the reference to the recording sessions clearly included the Recordings.

489. The third and fourth recitals then identify the claims which were being settled by the Mitchell Release. It should however be noted that the fourth recital to the Mitchell Release refers to a desire to settle all of the identified claims as against the Hendrix Estate, AYE and their respective *"successors and/or assigns"*. By contrast, the fourth recital to the Redding Release makes reference to the desire of Mr Redding to settle all of the claims identified in the third recital; that is to say claims against the Hendrix Estate, Warner Brothers Records and Warner Brothers Pictures. There is no express reference, in the fourth recital to the Redding Release, to successors or assigns.

490. Clause 1 contains two provisions. The first provision is a release *"from any and all liability or responsibility to account to me for or pay royalties or other compensation to me in connection with any such recordings."*. The recordings are identified to include *"any soundtrack recordings"*, which I take to refer back to the reference to *"performances of JIMI HENDRIX on which I* [Mr Mitchell] *performed"*. The beneficiaries of the release were the Hendrix Estate, AYE and their respective successors and/or assigns and any record companies with whom Jimi Hendrix, the Hendrix Estate or their successors or assigns might have contracted with in the past or might contract with in the future for distribution and sale of records embodying performances of Jimi Hendrix on which Mr Mitchell performed. This release is therefore widely drafted. In particular, it is a release of the Hendrix Estate from any and all liability or responsibility to account to Mr Mitchell for or pay royalties or other compensation in connection with the recordings referred to in the release.

491. The second provision in clause 1 is a covenant not to sue which is also widely drafted, catching claims for compensation against the Hendrix Estate, AYE and their respective successors and/or assigns, *"arising out of the distribution of any recordings made pursuant to such contracts or agreements."*; that is to say contracts and agreements predating the Mitchell Release and future contracts and agreements.

492. Clause 2 contains an acknowledgment in similarly broad terms to clause 1. In particular, it acknowledges full settlement of any compensation which may be claimed in the future from the sale of the recordings referred to in clause 1.

493. Clause 3 deals with the Warner Brothers film, and is not relevant for present purposes. Clause 4 however contains a covenant not to sue which is drafted in the widest possible terms. Its scope includes any type of claim for damages, expenses or compensation against the Hendrix Estate in connection with Mr Mitchell's participation in the Performances.

494. Clause 5 confirms Mr Mitchell's receipt of advice before executing the Release. Clause 6 then sets out a series of exceptions from the Mitchell Release. I note that those excepted include Mr Jeffery, Mr Jeffery's estate, Mr Chandler and any form of business carried out by the Producers. It is however also important to note that the exception relates to whatever claims and rights, if any, which Mr Mitchell *"may now have"* against the excepted parties. Future claims were not included in the exceptions in clause 6.

495. Clause 7 provides a definition of the word *"Recordings"*, as used in the Mitchell Release. It will be noted that the definition includes, in addition to physical items such as discs and tape recordings, *"any other means or modes now known or used or hereafter developed and used for the reproduction of sound"*. This seems to me to include modern methods of streaming music which, however else they may differ from a record or tape, are still methods for the reproduction of sound.

496. Finally, clause 8 states Mr Mitchell's agreement to *"enter stipulations for discontinuance with prejudice"* of the Supreme Court Claim and *"any other actions or suits which I may have heretofore caused to be filed against the ESTATE OF JIMI HENDRIX and/or Are You Experienced, Ltd in any court in any jurisdiction throughout the world."*. Clause 8, at least, was clearly intended to have a worldwide reach.

497. As with the Redding Release, it seems to me that the releases in the first sentence of clause 1 and in clause 2 fall to be read, in the context of the Claims, as covenants not to sue. Effectively therefore, and so far as the Claims are concerned, the Mitchell Release contains a series of covenants not to sue.

498. The Mitchell Release does not contain any equivalent to the final part of clause 3 of the Redding Release, with its reference to world-wide rights. In my view however the position is the same as in relation to the Redding Release in this respect. I do not think that the Copyrights can be treated as being excluded from the scope of the Mitchell Release on the basis that they were UK rights. I say this for two reasons. First, and as with the Redding Release, I find it very difficult to see how the Mitchell Release, which was clearly expressed to include the Recordings within the scope of the settlement terms in the Mitchell Release, could be read as excluding the Copyrights. To do so would, again, effectively deprive the Mitchell Release of a substantial part of its effect, without any wording which suggests that the Mitchell Release was to be qualified in this way. Second, there is reference in clause 4 of the Mitchell Release to the settlement of actions commenced anywhere in the world. This seems to me to have been a clear acknowledgment that the Mitchell Release was intended to operate on a worldwide basis.

499. As with the Redding Release, I do not consider this conclusion inconsistent with the findings and conclusion on the eighth expert issue. In my view there is sufficient in the Mitchell Release to justify, even on a cautious approach, the conclusion that the Mitchell Release was intended to have effect on a worldwide basis.

500. It is clear that the terms of the Mitchell Release were not restricted to any particular methods for the delivery of the music contained in the Recordings. This is confirmed by clause 7, which defines *"Recordings"* to include *"any other means or modes now known and used or hereafter developed and used for the reproduction of sound and sound synchronised with visual images"*.

501. In summary, and as with the Redding Release, it seems clear to me that the Mitchell Release was intended to include, and did include all and any rights which Mr Mitchell had or might in the future have in the Recordings.

502. I have already dealt with the question of whether the covenants not to sue would have acted as an effective bar to a claim by Mr Redding for infringement of the Copyrights against the Hendrix Estate. The same reasoning seems to me to apply to the covenants not to sue in the Mitchell Release.

503. Drawing together all the above analysis, my conclusion as to the meaning and effect of the Mitchell Release in relation to the Copyright Claim, on the assumption that Mr Redding was a part-owner of the Copyrights, is that the Mitchell Release contained covenants not to sue which had the effect of precluding a claim by Mr Mitchell for infringement of the Copyrights against the Hendrix Estate.

504. As with the Redding Release I have expressed the above conclusions by reference to the position of the Hendrix Estate, if it had been confronted with the equivalent of the Copyright Claim. There are further issues to consider in order to determine whether the Defendant can rely upon the Mitchell Release, in relation to the Copyright Claim, to the same extent as the Hendrix Estate could have done so.

What were the meaning and effect of the Mitchell Release in relation to the PPR Claim?

505. In relation to the Mitchell Release my reasoning is effectively the same as my reasoning in relation to the Redding Release. It seems to me quite clear that the relevant provisions in the Mitchell Release were amply wide enough to include the acts of exploitation of the Performances covered by the PPRs. The various covenants not to sue in the Mitchell Release were unqualified. They clearly included any earnings of Mr Mitchell from the Recordings and the Performances.

506. I can therefore come straight to my conclusion. The Mitchell Release contained covenants not to sue which had the effect of precluding a claim by Mr Mitchell for infringement of the PPRs against the Hendrix Estate. I again express this conclusion by reference to the Hendrix Estate. There are further issues to consider in order to determine whether the Defendant can rely on the Mitchell Release, in relation to the PPR Claim, to the same extent as the Hendrix Estate could have done so.

Is Experience the successor to the benefit of the Releases?

507. In relation to the benefit of the Releases, it seems to me that there are two questions to consider. The first question is whether the benefit of the Releases was personal to the Hendrix Estate and incapable of assignment. The second question, assuming that the answer to the first question is no, is whether the benefit of the Releases did in fact pass to Experience.

508. The starting point is my findings and conclusion on the sixth expert issue. I have concluded that the benefit of a release or a covenant not to sue is capable of assignment, even in the absence of a provision in the release or covenant which authorises such assignment.

509. The next point is that I cannot see that either the Redding Release or the Mitchell Release had any of the features which might lead one to conclude that either Release was intended

to be personal to the Hendrix Estate. The terms of each Release were very wide. They were intended to settle any claims which had arisen or might arise in relation to, amongst other matters, the Performances and the Recordings. It seems to me that it would be very odd to treat the benefit of either Release as personal to the Hendrix Estate.

510. In addition to this the Hendrix Estate was obviously not going to be the long term owner of the benefit of the Releases. I assume that the duties of Mr Hagood, as administrator of the Hendrix Estate, included the duty to get in and distribute the assets of the Hendrix Estate, in accordance with the applicable rules of intestacy. It would, again, be very odd if the benefit of the Releases, that is to say part of the property of the Hendrix Estate, fell to be treated as personal to the Hendrix Estate and incapable of passing to Al Hendrix, as the beneficiary of the Hendrix Estate, or to any other party.

511. The above considerations seem to me to be sufficient to establish that the benefit of the covenants not to sue in the Releases were capable of assignment, together with, in the case of the Redding Release, the right to grant consent to the use of Mr Redding's performances which was assigned to the Hendrix Estate by clause 2 of the Redding Release.

512. In the case of the Mitchell Release, this position is further confirmed by the reference to the successors and/or assigns of the Hendrix Estate in the fourth recital and the further references to successors and/or assigns of the Hendrix Estate in clauses 1, 3 and 4 of the Mitchell Release.

513. In relation to this last point I use the expression *"further confirmed"* deliberately. I do not think that the position is one where the references to *"successors and/or assigns"* in the Mitchell Release means that the benefit of the Redding Release must be assumed to have been personal to the Hendrix Estate. I say this for two reasons. First, I take the view that the benefit of each of the Releases was capable of assignment, even without this additional confirmation in the case of the Mitchell Release. Second, and as I have previously explained, I do not think that it is permissible to construe the Releases against each other. The Releases have to be constructed independently of each other. The inclusion of a provision to a particular effect in one Release cannot, in my view, be relied upon to argue that the parties to the other Release must be taken to have intended that their Release should not have that effect.

514. I therefore conclude that the answer to the first question is no. The benefit of each of the Releases was capable of assignment. More accurately, the benefit of the covenants not to sue in the Releases and, in the case of the Redding Release, the benefit of the right to grant consent to the use of Mr Redding's performances, were capable of assignment.

515. This brings me to the second question, which is whether the benefit of the Releases did in fact pass to Experience. This engages the question of whether the Defendant can demonstrate the required chain of title between the Hendrix Estate and Experience.

516. The chain of title relied upon by the Defendant in this context is pleaded in Schedule 1 to the Amended Defence. It is considerably simpler than the chain of title in relation to the Producers and, so far as I can see, was not in itself subject to any real issues between the parties. There was none of the detailed argument to which the chain of title from the Producers was subjected.

517. It did not appear to be in dispute that the property held by the Hendrix Estate passed to Al Hendrix, on completion of the administration of the Hendrix Estate. This was achieved by an instrument of distribution of assets and liabilities executed by Mr Hagood on 30th March 1977. It is clear from the terms of this instrument that it was intended to include all of the property of the Hendrix Estate, including the benefit of the Releases.

518. From there the Defendant relied upon the instrument of assignment of 11th August 1995 which was entered into between Al Hendrix and Experience, pursuant to the settlement agreement of 28th July 1995. I have already referred to both the settlement agreement and the instrument of assignment in my analysis of the chain of title from the Producers. In relation to those documents I have already made the point that they were part of a comprehensive settlement, together with the instrument of assignment between Interlit and Experience which was also dated 11th August 1995, whereby very broadly defined property passed into the ownership of Experience from various parties who included Al Hendrix. It did not appear to be in dispute that this property would have included the benefit of the Releases if, as I have concluded, they were capable of assignment. In any event, I am satisfied that the settlement agreement and the instrument of assignment between Al Hendrix and Experience were sufficient to convey the benefit of the Releases to Experience.

519. There is also, if it is required, the further assignment by deed, dated 13th November 2000, which was entered into between Mr Hagood, as administrator of the Hendrix Estate, Mr Leighton-Davis, as ancillary administrator of the Hendrix Estate in England and Wales, and Experience. This assignment was broadly expressed to include anything which might have been left in the Hendrix Estate, if any property in the Hendrix Estate had not previously been vested in Al Hendrix.

520. On the basis of the chain of title relied upon by the Defendant, I find and conclude that the benefit of the Releases passed from the Hendrix Estate to Experience.

521. On this basis, I did not understand it to be in dispute that the Defendant could equally rely on the benefit of the Releases, by virtue of the licence to SME and the sub-licence to the Defendant.

522. There is one point which I should add, for the sake of completeness, while considering the position of the Defendant in relation to the Releases. The Claimants argued that the covenants not to sue, as contained in the Releases, could still not assist the Defendant, because the Defendant had not counterclaimed, in this action, for damages for breach of the covenants not to sue. As such, so the Claimants argued, the covenants not to sue could not operate as a bar to the Claims, even if, contrary to the Claimants' case, the covenants extended to the Claims and the benefit of the covenants had passed to Experience. I do not think that there is any merit in this argument, for the same reasons as I have already set out in considering the fifth expert issue; namely the effect of a covenant not to sue as a matter of New York law. The Releases, and the covenants not to sue contained therein are clearly pleaded by the Defendant as a defence to the Claims. Given my findings in the law of New York in this respect, I cannot see that the Defendant was required to plead a counterclaim in damages in order to rely on the covenants not to sue as a defence to the Claims. In my view, if the Claims are caught by the covenants not to sue, as I have

decided they are, it would be an abuse of process to allow the Claims to succeed on the sole basis that no counterclaim for damages has been made in the action.

523. I therefore conclude that the Defendant is entitled to rely upon the Releases, as against the Claimants, to the same extent as the Hendrix Estate could have done so.

What were the meaning and effect of the Redding Discontinuance in relation to the Copyright Claim?

524. The first question to deal with, in relation to the Redding Discontinuance, is whether, as the Claimants argued, it was of no effect because of a failure of compliance with CPLR (Civil Practice Law and Rules) 3217(a)(2). I have already set out this rule, but I repeat it for ease of reference:

> *"(a) Without an order. Any party asserting a claim may discontinue it without an order*
>
> *2. By filing with the clerk of the court before the case has been submitted to the court or jury a stipulation in writing signed the attorneys of record for all parties, provided that no party is an infant, incompetent person for whom a committee has been appointed or conservatee and no person not a party has an interest in the subject matter of the action; or"*

525. As I understand the position, the Redding Discontinuance was filed, as a discontinuance with prejudice by Mr Redding, in reliance upon the procedure in Rule 3217(a)(2). The Redding Discontinuance was not signed by Mr Mitchell or his attorney so that, on the face of it, there was a failure of compliance with Rule 3217(a) (2). As such, the Claimants argue that the Redding Discontinuance was of no effect.

526. Although I have considered the position in relation to New York law, as it applies to this argument, I have also made reference to the Defendant's initial objection, in response to this part of the Claimants' case. This initial objection was that the Claimants should not be permitted to rely upon this argument because it had not been pleaded.

527. In my view there is merit in this pleading objection. The argument that the Redding Discontinuance was ineffective by reason of the missing signature was not pleaded by the Claimants. The Claimants sought to contend that the argument was sufficiently pleaded in paragraph 21 of the Amended Reply. I do not accept this contention. All that paragraph 21 does is to admit the existence of the Discontinuances, but not their effect. I cannot see that this general non-admission of the effectiveness of the Discontinuances is sufficient to engage the missing signature argument. The Claimants also sought to argue that, when it came to questions of New York law, it was not necessary to plead New York law. This argument seems to me however to miss the key point, which is that the missing signature argument is not solely an argument of law. It engaged the factual question of whether the Redding Discontinuance was or was not signed by or on behalf of Mr Mitchell. This, in turn, required factual investigation of what versions of the Redding Discontinuance exist, in addition to the copy of the Redding Discontinuance which was available at the Trial. I accept the Defendant's argument that, because the missing signature argument was only first raised by Mr Cohen in his first expert report, and was not pleaded, the Defendant was deprived of the opportunity to carry out historical investigations which might have shed further light on the question of whether the Redding Discontinuance was or was not signed by or on behalf of Mr Mitchell.

528. This point can be taken further. I refer to my findings and conclusion on the ninth expert issue. I have concluded that a stipulation of discontinuance which is not signed by an attorney for a party to the relevant action is not necessarily invalid. The defect may be waived, if there is evidence sufficient to support the existence of such a waiver. It may be possible to treat the discontinuance as a release, if there is sufficient evidence of an intention that the discontinuance should have this effect. The question of whether there has been a waiver in any particular case seems to me to engage, or at least to be capable of engaging questions of fact. In particular, and on the facts of the present case, the question of waiver requires some investigation of what has happened since the Discontinuances, in terms of whether the missing signature argument can be said to have been the subject of a waiver, as argued by the Defendant. There is also the interesting question of whether the missing signature argument is available at all in relation to the Mitchell Discontinuance, which postdated the Redding Discontinuance. By the time the Mitchell Discontinuance was filed with the court, the Redding Discontinuance had already been filed. Did that earlier filing have the effect of removing Mr Redding as a party to the Supreme Court Claim, in which the Discontinuances were filed, if there was a failure of compliance with Rule 3217(a)(2)? I was told by Mr Johnson, in his oral closing submissions, that the effect of the missing signatures was that the Discontinuances were not with prejudice, and thus could not have preclusive effect. If this is right, did this mean that the Redding Discontinuance was still sufficient to remove Mr Redding as a party to the Supreme Court Claim, so that his attorney did not need to sign the Mitchell Discontinuance? These interesting questions were not the subject of proper investigation at the Trial, in common with the lack of investigation of the New York court records and the lack of investigation of the factual questions engaged by the issue of waiver. This lack of proper investigation can be traced back to the failure of the Claimants to plead their case on Rule 3217(a)(2).

529. The pleading objection is also material because Mr Howe argued in oral closing submissions, in support of the Defendant's case that the missing signature was not fatal to the effectiveness of the Redding Discontinuance, that the presumption of regularity could be relied upon to establish that the Redding Discontinuance had been signed by all the required parties. Mr Howe argued that although this was a presumption of the law of this jurisdiction, it could be applied to the Redding Discontinuance because the question was one which related to my approach to the evidence, which was a procedural matter governed by the law of this jurisdiction. In my view the presumption of regularity cannot be relied upon to the extent of allowing me to assume that there is or was, somewhere in existence, a version of the Redding Discontinuance which was signed by Mr Mitchell's attorney. Assuming, without deciding, that Mr Howe was right in his argument that the presumption of regularity was available in the case of the Redding Discontinuance, I do not think that the presumption of regularity can fill this gap in the evidence. It follows that the application of the presumption of regularity is not a means by which the pleading problem, created by the failure to plead the missing signature argument, can be avoided.

530. In my view the missing signature argument, as I am referring to the same, was an argument which needed to be pleaded, and was not pleaded. I accept that the Defendant was thereby prejudiced, because it was deprived of a fair opportunity to investigate the factual questions raised by this argument, and to plead its case in response to the argument following such investigation. There was no application to amend in this respect. In these circumstances I conclude that the Claimants should not be permitted to

pursue the argument that the Redding Discontinuance was deprived of effect by reason of non-compliance with Rule 3217(a)(2). In the absence of any other suggested defect in the Redding Discontinuance, I treat the Redding Discontinuance as a stipulation with prejudice filed with the court in compliance with Rule 3217(a)(2).

531. This clears the way for my consideration of the question of the meaning and effect of the Redding Discontinuance in relation to the Copyright Claim. Do the principles of res judicata apply, so as to preclude the Copyright Claim? In answering this question New York law applies the transactional approach. A stipulation discontinuing an action with prejudice will have a preclusive effect in respect of (i) matters actually litigated in the discontinued action, (ii) matters which could have been litigated in the discontinued action, and (iii) matters which were contemplated by the associated settlement agreement; see my findings and conclusion on the tenth expert issue.

532. The answer to the question of whether the principles of res judicata apply in the case of the Redding Discontinuance follows from my findings and conclusions on the tenth, twelfth and thirteenth expert issues, and from my construction of the Redding Release. In relation to the tenth expert issue, I have found and concluded that, where there is a discontinuance with prejudice arising from a settlement agreement, the scope of res judicata extends to claims contemplated in the associated settlement agreement. In relation to the twelfth and thirteenth expert issues I have found and concluded that the questions of the ownership and value of the Copyrights were, or at least could have been raised in the Historical New York Claims. On the basis of my construction of the Redding Release, I have concluded that the Redding Release included within its scope any rights and/or claims of Mr Redding in relation to the Recordings. The Redding Release thereby included any rights and/or claims of Mr Redding in relation to the Copyrights. It follows that the Copyright Claim was a claim which was contemplated by the relevant settlement agreement, namely the Redding Release. Applying the transactional approach adopted by New York law in this context, it follows that the Redding Discontinuance did have the effect of precluding the Copyright Claim.

533. I therefore conclude that the Redding Discontinuance did have the effect of precluding the Copyright Claim, against the Hendrix Estate.

534. Once again, I have expressed this conclusion by reference to the position of the Hendrix Estate, if it had been confronted with the equivalent of the Copyright Claim. There are further issues to consider in order to determine whether the Defendant can rely on the Redding Discontinuance, in relation to the Copyright Claim, to the same extent as the Hendrix Estate could have done so.

What were the meaning and effect of the Redding Discontinuance in relation to the PPR Claim?

535. So far as the PPR Claim is concerned, my reasoning on the effect of the Redding Discontinuance in relation to the Copyright Claim again applies. I refer to my decision on the pleading objection, the consequence of which is that the Redding Discontinuance falls to be treated as valid and effective. It is true that PPR Claim was not made, and could not, as such, have been made in the Historical New York Claims, because the relevant rights did not exist. In this context however I refer to my findings and conclusions on the first, second, and tenth to thirteenth expert issues, and also to my conclusions on the construction of the Redding Release. As I have concluded, the Redding Release included within its scope the PPR Claim, because it included a

compromise of Mr Redding's rights in relation to the Performances. As such, it would not have been open to Mr Redding, as against the Hendrix Estate and by reason of the effect of the Redding Discontinuance, to make a claim in respect of rights in the Performances including, if they had existed at the time of the Redding Discontinuance, the PPRs.

536. I therefore conclude that the Redding Discontinuance did have the effect of precluding the PPR Claim, against the Hendrix Estate.

537. Once again, there are further issues to consider, in order to determine whether the Defendant can rely on the Redding Discontinuance, in relation to the PPR Claim, to the same extent as the Hendrix Estate could have done so.

What were the meaning and effect of the Mitchell Discontinuance in relation to the Copyright Claim?

538. My answer to this question follows from my reasoning on the effect of the Redding Discontinuance in relation to the Copyright Claim. That reasoning seems to me equally to apply to the effect of the Mitchell Discontinuance in relation to the Copyright Claim. I therefore conclude that the Mitchell Discontinuance did have the effect of precluding the Copyright Claim, as against the Hendrix Estate. Again, I reserve the question of whether the Defendant can rely on the Mitchell Discontinuance, in relation to the Copyright Claim, to the same extent as the Hendrix Estate could have done so.

539. A point was taken by Mr Johnson, in his oral closing submissions that paragraph 1 of the Mitchell Discontinuance makes reference to an order of the Supreme Court (New York County) dated 16th July 1974. Paragraph 1 of the Mitchell Discontinuance refers to an appeal against that order by Mr Mitchell being withdrawn, with prejudice. I understood Mr Johnson's point to be that the terms of the order of 16th July 1974 were unknown, and that it might have been that the Supreme Court Claim, so far as it involved Mr Mitchell, was terminated by some document other than the Mitchell Discontinuance. This seemed however to be no more than a theory advanced by Mr Johnson. On the available evidence, I find that it was the Mitchell Discontinuance which was the document by which the Supreme Court Claim was terminated, so far as it involved Mr Mitchell.

What were the meaning and effect of the Mitchell Discontinuance in relation to the PPR Claim?

540. My answer to this question also follows from my reasoning on the effect of the Redding Discontinuance in relation to the PPR Claim. That reasoning, again, seems to me to apply equally to the effect of the Mitchell Discontinuance upon the PPR Claim. I therefore conclude that the Mitchell Discontinuance did have the effect of precluding the PPR Claim, against the Hendrix Estate. Again, I reserve the question of whether the Defendant can rely on the Mitchell Discontinuance, in relation to the PPR Claim, to the same extent as the Hendrix Estate could have done so.

Is Experience the successor to the benefit of the Discontinuances?

541. This question brings me to what I have described as the issues relating to the question of whether the Defendant can rely on the Discontinuances to the same extent as the Hendrix Estate could have done so. In reality, I do not think that there are issues in this respect.

542. I have already considered the question of whether Experience acquired the benefit of the Releases. For the reasons which I have set out in the relevant section of this judgment I

have concluded that the Defendant is able to show a valid chain of title between the Hendrix Estate and Experience, in relation to the benefit of the Releases. It seems to me that the same applies to the benefit of the Discontinuances.

543. I therefore conclude that Experience is the successor to the benefit of the Discontinuances. On this basis I did not understand it to be in dispute that the Defendant could equally rely on the benefit of the Discontinuances, by virtue of the licence to SME and the sub-licence to the Defendant.

544. Turning to the position of the Claimants, it was accepted by the Claimants' counsel, in their skeleton argument for the Trial, that the Claimants share privity of interest with, respectively, Mr Redding and Mr Mitchell, such that the Claimants are bound by whatever effect the Discontinuances had, as against Mr Redding and Mr Mitchell.

545. In their skeleton argument for the Trial the Claimants' counsel advanced what I understood to be arguments to the effect that the Discontinuances were not admissible in evidence. The Claimants also advanced what I understood to be an argument that, whatever the effect of the Discontinuances under New York law, they could not be effective in this jurisdiction, to preclude the Claims because, under the common law of England and Wales, there can only be res judicata in relation to causes of action. The transactional approach adopted by New York law, to which I have referred above, is not, so the Claimants argued, applied in this jurisdiction.

546. By reference to the arguments advanced at the Trial itself, both in the oral opening and closing submissions and in the written closing submissions, I did not understand these particular arguments to be pursued. They were not developed. In broad terms, the arguments at the Trial between the parties, in this context, were concerned with the width of principles of res judicata under New York law, with the question of whether the subject matter of the Claims was or could have been raised in the Historical New York Claims, and with the scope of the Releases and the Discontinuances. In case however I have misunderstood the position, in terms of the issues between the parties, I cannot see any good reason why the Discontinuances are not admissible in evidence in this jurisdiction. Nor can I see any good reason why the Discontinuances cannot be treated as effective stipulations discontinuing proceedings with prejudice under New York law. I have already dealt with what I have referred to as the missing signature argument. Equally, given my findings on the scope of the Discontinuances and the Releases, I do not see why the Discontinuances cannot be treated as having a preclusive effect on the Claims in this jurisdiction.

547. I therefore conclude that Experience is the successor to the benefit of the Discontinuances and that, for that reason, the Defendant is entitled to rely upon the Discontinuances, as against the Claimants, to the same extent as the Hendrix Estate could have done so.

<u>What is the effect of the Transitional Provisions in relation to the Releases and the Discontinuances?</u>

548. So far as the Transitional Provisions are concerned, it seems to me that the position is effectively the same as it is in relation to the Recording Agreement. The Transitional Provisions did not give rise to any new rights, either in relation to the Releases or the Discontinuances. So far as this may have been necessary, the Transitional Provisions do

confirm that the effect of the Releases and the Discontinuances is preserved and can be relied upon by the Defendant, in relation to the PPRs.

Are the Claims an abuse of process within the principle in *Henderson v Henderson*?

549. In the light of my conclusions on the effect of the Discontinuances in relation to the Claims, the Defendant does not need to rely upon its argument that the Claims are an abuse of process within the principle established in *Henderson v Henderson* (1843) 3 Hare 100. Beyond this, it seems to me that my conclusions on the effect of the Discontinuances leave no space for a *Henderson* abuse argument. *Henderson* abuse occurs where a question could and should have been raised in earlier proceedings, or was abandoned in earlier proceedings, and where the raising of the same question in subsequent proceedings constitutes an abuse of the process of the court.

550. In the present case, consideration of the question of *Henderson* abuse requires the assumption that the questions underlying the Claims, effectively the rights of Mr Redding and Mr Mitchell in relation to the Recordings and the Performances, were not raised in the Historical New York Claims, or were raised and then abandoned. This is not however what happened in the present case. Applying my earlier conclusions on the tenth to thirteenth expert issues and on the meaning and effect of the Releases, (i) the subject matter of the Claims was raised in the Historical New York Claims, (ii) the subject matter of the Claims was the subject of the settlements constituted by the Releases, and (iii) the New York law doctrine of res judicata applies, by virtue of the Discontinuances, to the Claims.

551. Given this position, I do not see how the doctrine of *Henderson* abuse can operate. The counter-factual assumption can be made that the questions underlying the Claims were not raised in the Historical New York Claims, but it seems to me that this does not alter either the effect of the Releases or the effect of the Discontinuances, each of which preclude the Claims. The doctrine of *Henderson* abuse assumes a case where a particular question could and should have been raised in earlier proceedings, but has not itself been the subject of any settlement in those earlier proceedings. As such, it seems to me that question of *Henderson* abuse can only be considered in the present case if one assumes that the Claims were outside the scope of both the Releases and the Discontinuances. If however one makes this assumption, and combines it with the assumption that the questions underlying the Claims were not raised in the Historical New York Claims, the position seems to me to be, as I have said, that there is no space left for the doctrine of *Henderson* abuse to operate.

552. I can see that the position would be different if, for some reason, the Releases and the Discontinuances do not have a preclusive effect on the Claims in this jurisdiction. On that hypothesis it seems to me that it would be an abuse, within the principle in *Henderson v Henderson*, for the Claims to be pursued in this jurisdiction, given the preclusive effect of the Releases and the Discontinuances. This is not however the position. As I understand the position, it is not in dispute that the Releases can take effect in this jurisdiction. My understanding is that the position is the same in relation to the Discontinuances, but if I have misunderstood the position, and as I have said, I do not see why the Discontinuances cannot have effect in this jurisdiction.

553. In summary, I do not think that the Claims are an abuse of process within the meaning of *Henderson v Henderson*, because the Claims are precluded by the Releases and by the Discontinuances.

Are the Claims precluded by the Releases?

554. For the reasons which I have explained, the Claims are precluded by the Releases.

Are Claims precluded by the Discontinuances?

555. For the reasons which I have explained, the Claims are precluded by the Discontinuances.

Did the conduct of Mr Redding and Mr Mitchell (and/or their successors) grant implied licences to the Defendant to exploit the Recordings and/or the Performances?

556. In common with the issues in relation to the Releases and Discontinuances, and given my earlier conclusions, the issue of whether Mr Redding and Mr Mitchell and/or their successors granted implied licences to the Defendant to exploit the Recordings and/or the Performances does not strictly arise for decision. The same applies to the next issue (or set of issues); namely the question of whether estoppel and/or other doctrines of equity are engaged as defences to the Claims. As however these two issues (or sets of issues) also engage questions arising on the evidence at the Trial, and in case the Claims should go further, I will deal briefly with each of these two issues. I should mention that neither of these issues received that much attention in the oral submissions at the Trial. The submissions on these issues were largely confined to the written submissions.

557. As the case is explained in the Defendant's skeleton argument for the Trial, the Defendant's case that Mr Redding and/or Mr Mitchell granted implied licences to the Defendant to exploit the Recordings and/or the Performances seemed to me to proceed on a misconceived basis. The Defendant's argument in the skeleton argument was that the implied licence alleged in paragraph 34.5 of the Amended Defence arose *"from the clear and unequivocal statements contained in the Releases to the effect that future exploitation of the Recordings and Performances would not be subject to payment of compensation of any kind to NR or MM, or their successors."*. This argument relies on the Releases as the source of the implied licence.

558. The terms of the Releases are not pleaded, at least in terms, as the source of the implied licence in paragraph 34.5 of the Amended Defence. Leaving this point to one side however, it seems to me that the argument of an implied licence necessarily proceeds on the hypotheses (i) that the Band Members were the first owners of the Copyrights, (ii) that the Recording Agreement did not contain any provision sufficient to amount to a consent to exploit the Performances, (iii) that if the Recording Agreement did contain such a consent, the Defendant does not have the benefit of that consent, and (iv) that the Releases and the Discontinuances were insufficient, in themselves, to prevent the bringing of the Claims. As matters have turned out, and for the reasons which I have explained, these hypotheses have not been established. It seems to me however that the implied licence argument falls to be considered on the basis that these hypotheses have been established, and that the Recording Agreement, the Releases and the Discontinuances are each insufficient to constitute any kind of licence to exploit the Recordings and the Performances. If and to the extent that these hypotheses are wrong, and the Defendant has the ability to exploit the Recordings and the Performances on the basis of the Recording Agreement and/or the Releases and the Discontinuances, the argument of implied licence is not required and does not arise.

559. It therefore follows that, for the purposes of considering the implied licence argument, it is necessary to consider the conduct of the parties as whole, on the basis of the hypotheses set out in my previous paragraph, and to ask whether there can be found in that conduct the grant of an implied licence of the kind alleged by the Defendant.

560. In terms of the test for determining whether a licence of the kind alleged by the Defendant has come into existence, my attention has been drawn to the decision of Robert Goff J (as he then was) in *Redwood Music v Chappell & Co.* [1982] RPC 109. At page 128 of the report the judge approved the following statement of the test for determining whether a copyright licence had been created by conduct:

> *"On the basis of these facts, it was submitted by Mr. Morritt that this was a clear case of an implied licence. The test to be applied, he submitted, was an objective one: viz. whether, viewing the facts objectively, the words and conduct of the alleged licensor, as made known to the alleged licensee, in fact indicated that the licensor consented to what the licensee was doing. That test I accept as correct."*

561. Applying this test to the facts of the present case, and proceeding on the basis of the hypotheses which I have set out above, there is nothing in the evidence to support the creation of an implied licence. I say this for several reasons.

562. So far as I am aware, SME only came on to the scene on 19th August 2009, when it was granted a licence to exploit the Recordings by Experience. I assume that the same applies to the Defendant, whose rights depend upon being the sub-licensee of SME. The Defendant's pleaded case is that by permitting the exploitation of the Recordings and/or the Performances without any material objection for over half a century, between 1967/1968 and the commencement of the Claims in February 2022:

> *"NR and/or MM, and/or their respective heirs and/or successors in title to any rights relevant to the claims herein granted an implied, irrevocable licence for such exploitation, which is binding on the Claimants as their successors who are estopped from purporting to terminate such licence."*

563. It is less than clear how this alleged course of conduct can have created an implied licence in favour of the Defendant, which was not on the scene for a substantial part of this period.

564. Beyond this, such an implied licence can only have arisen in circumstances where there were words and conduct on the part of Mr Redding and/or Mr Mitchell and/or their successors, as made known to the alleged licensee, which in fact indicated that the licensing party consented to what the licensee was doing. Proceeding on the basis of the hypotheses identified above, the evidence in the present case comes nowhere near establishing any words or conduct of the kind required, at any point since 1967/1968; being the start date relied upon by the Defendant for the purposes of the implied licence argument.

565. The most which can be said is that Mr Redding and Mr Mitchell and their successors, until the involvement of the Claimants and commencement of the Claims, did little or nothing to pursue their alleged rights in respect of the Recordings and the Performances, following the settlement of the Historical New York Claims. I have already described, in the narrative section of this judgment, the limited steps taken by Mr Redding to assert

his alleged rights, following the settlement. So far as I am aware, Mr Mitchell took no steps to assert his alleged rights, following the settlement.

566. This limited activity and inactivity is not however sufficient to support the creation of an implied licence of the kind alleged by the Defendant. It is clear from *Redwood Music* that much more than this is required. I accept the submission of the Claimants' counsel that it is not the law that inaction or absence of conduct, without more, can give rise to an implied licence.

567. In this context it seems to me that the evidence of the Claimants' factual witnesses, and the evidence of the AYE Book is of some value. It is clear from this evidence, at the least, that both Mr Redding and Mr Mitchell took the view that they had been unfairly treated, and had not been fairly remunerated for their role in the success of JHE. None of this evidence is consistent with either Mr Redding or Mr Mitchell, on the assumption that their licence was required for the exploitation of the Recordings and/or the Performances, ever having been willing to grant such licence, without reward, to any other party.

568. In summary, if this issue had arisen for decision and on the basis of the hypotheses which apply to my consideration of this issue, I would have concluded that there was no conduct on the part of Mr Redding or Mr Mitchell or their successors sufficient to give rise to the grant of any implied licence to the Defendant to exploit the Recordings and/or the Performances.

Was the conduct of Mr Redding and Mr Mitchell (and/or their successors) such as to estop or preclude any challenge to the Defendant exploiting the Recordings and/or the Performances on the basis of estoppel and/or laches and/or delay and/or on the basis that the Claims are now an abuse of process on the ground that they cannot fairly be tried?

569. Although there are different equitable doctrines engaged by this issue (or set of issues), I can take them together. I say this because it seems to me that essentially the same problems confront the Defendant, in its attempt to rely upon each of these equitable doctrines.

570. I should start by repeating the point which I have already made, at the outset of my consideration of the previous issue.

571. As with the implied licence argument, it seems to me that the argument that the Claimants are now precluded from challenging the Defendant's exploitation of the Recordings and/or the Performances necessarily proceeds on the hypotheses (i) that the Band Members were the first owners of the Copyrights, (ii) that the Recording Agreement did not contain any provision sufficient to amount to a consent to exploit the Performances, (iii) that if the Recording Agreement did contain such a consent, the Defendant does not have the benefit of that consent, and (iv) that the Releases and the Discontinuances were insufficient, in themselves, to prevent the bringing of the Claims. If and to the extent that these hypotheses are wrong, and the Defendant has the ability to exploit the Recordings and the Performances on the basis of the Recording Agreement and/or the Releases and/or the Discontinuances, the arguments of the Defendant engaged by this issue are not required and do not arise. It follows that, for the purposes of considering this issue, it is again necessary to consider the conduct of the parties as a whole, on the basis of the hypotheses set out above, and to ask whether there can be found in that conduct sufficient

to support a defence to the Claims of estoppel and/or laches and/or delay and/or abuse of process.

572. So far as the conduct of Mr Redding and Mr Mitchell and their successors was concerned, prior to the Claimants coming on to the scene, I have already made my findings on the evidence. The most which can be said is that there was very limited activity on the part of Mr Redding, in asserting his alleged rights in respect of the Recordings and the Performances as against those exploiting the Recordings and the Performances, following the settlement of the Historical New York Claims; see the narrative section of this judgment. Prior to the advent of the First Claimant, this activity did not extend to his successors. So far as I am aware there was no activity on the part of Mr Mitchell or his successors, prior to the advent of the Second Claimant, in asserting his alleged rights in respect of the Recordings and the Performances, as against those exploiting the Recordings and the Performances, following the settlement of the Historical New York Claims.

573. It is however also clear from the evidence that there was never any representation made, either by Mr Redding or Mr Mitchell or by their respective successors to the effect that the Defendant or any of its predecessors were entitled to exploit the Recordings or the Performances. There is no evidence of any such express representation having been made. In terms of representation by conduct, all that the Defendant can rely upon is the limited activity/absence of activity on the part of Mr Redding and Mr Mitchell and their successors, prior to the arrival of the Claimants on the scene.

574. In his oral opening submissions Mr Howe identified, as one of the matters which he submitted had not been pleaded by the Claimants, various factual assertions made by the Claimants in relation to the conduct of Mr Redding. By way of example Mr Howe complained that it had not been pleaded that Mr Redding had been unable to pursue claims by reason of his financial position, or that Mr Redding did not make claims by reason of some sort of promise made to him by Janie Hendrix. Strictly speaking, it seems to me that this complaint was well-founded. The pleading of the Claimants' case in response to the defence of estoppel raised by the Defendant is somewhat exiguous; see paragraphs 27-29 of the Amended Reply. The facts relied upon in this respect by the Claimants at the Trial were not pleaded. In reality, I do not think that this matters. I do not regard it as relevant to investigate the reasons for the limited activity or absence of activity on the part of Mr Redding and Mr Mitchell and, prior to the Claimants coming on to the scene, their successors. The relevant point is that it is clear that neither Mr Redding nor Mr Mitchell nor their successors made any representation, either expressly or by conduct, to the effect that the Defendant or any of its predecessors were entitled to exploit the Recordings or the Performances.

575. Looking at matters from the Defendant's side, there is no evidence of any kind, either oral or documentary, of either the Defendant or its predecessors having placed any reliance, in their exploitation of the Recordings and the Performances, on the conduct or absence of conduct on the part of Mr Redding or Mr Mitchell or their successors. Nor is there any evidence of the Defendant or its predecessors having acted to their detriment, or even in a different manner, in their exploitation of the Recordings and the Performances, on the basis of the conduct or absence of conduct on the part of Mr Redding or Mr Mitchell or their successors,

576. The Defendant's counsel did seek to argue, in their skeleton argument for the Trial, that the Hendrix Estate, as predecessor in title of Experience, clearly did rely on the representations made in the Releases to enter into transactions concerning the Releases and the Recordings. While I can see how that inference can fairly be drawn from the documentary evidence, this particular point seems to me to beg the question of the effect of the Releases. If the Releases were insufficient, in themselves, to prevent the bringing of the Claims, then I have difficulty in seeing how they could be relied upon as representations that it was open to the Hendrix Estate and its successors to exploit the Recordings and the Performances. If the Releases were sufficient, in themselves, to prevent the bringing of the Claims, the question of whether the additional defences raised by this issue are available is not required and does not arise. Putting the matter more simply, this part of the Defendant's case did not seem to me to respect the hypotheses on the basis of which this issue has to be considered.

577. Turning to the law, it does not seem to me that the lack of activity on the part of Mr Redding and Mr Mitchell and their successors, or the delay in the assertion of their alleged rights, by the Claims, are sufficient to support any of the defences relied upon by the Defendant within this issue.

578. In this context I was referred by both parties to the well-known case of *Fisher v Brooker* [2009] UKHL 41 [2009] 1 WLR 1764. In this case Matthew Fisher, a musician, had waited 38 years before asserting a claim to a share of the musical copyright in Procol Harum's song, *Whiter Shade of Pale*.

579. The judge at first instance held that the claimant was entitled to declarations (i) that he was a joint author of the work, (ii) that he was a joint owner of the copyright to the extent of 40%, and (iii) that the defendants' implied licence to exploit the work had been revoked from the date of issue of proceedings. The claimant accepted that an implied licence to exploit the work had existed between 1967 and 2005; that is to say between the work being released and the commencement of the claimant's proceedings. On the defendants' appeal, the Court of Appeal affirmed the first declaration but, by a majority, set aside the second and third declarations on the ground, amongst other grounds, that the claimant had acted unconscionably and inexcusably in waiting 38 years, with knowledge and without reasonable excuse, while the defendants exploited the work, before notifying them of his claim to co-ownership of the copyright. Although the defendants had not suffered any detriment from reliance on the claimant's acquiescence, so as to entitle them to rely on the doctrine of proprietary estoppel, they were entitled to rely upon the defences of acquiescence and laches which did not require detrimental reliance.

580. The claimant's appeal to the House of Lords was allowed and the second and third declarations made by the judge at first instance were restored. The relevant facts in *Fisher v Brooker* were different to the present case, and engaged a wider range of issues than the defences which I am considering in relation to the present issue. The decision of the House of Lords in *Fisher v Brooker* is however relevant to the present case in two particular respects.

581. First, and as Lord Hope explained in his speech, at [7]-[9], there is a difference in principle between the exercise of an undoubted right of property and resort, for its protection, to discretionary remedies:

"7. But there is a crucial difference in principle between the exercise of an undoubted right of property and resort for its protection to discretionary remedies. In so far as Mr Fisher may seek to restrain what the other joint owner may do in the exercise of its share of the copyright by means of injunctions, he will be subject to the court's discretion. Unconscionable delay may well have a part to play in the court's decision whether or not he is entitled to such a remedy. But it would be a very strong thing, in the absence of a proprietary estoppel, to deny him the opportunity of exercising his right of property in his own share of the copyright.

8. The law of property is concerned with rights in things. The distinction which exists between the exercise of rights and the obtaining of discretionary remedies is of fundamental importance in any legal system. There is no concept in our law that is more absolute than a right of property. Where it exists, it is for the owner to exercise it as he pleases. He does not need the permission of the court, nor is it subject to the exercise of the court's discretion. The benefits that flow from intellectual property are the product of this concept. They provide an incentive to innovation and creativity. A person who has a good idea, as Mr Fisher did when he composed the well-known organ solo that did so much to make the song in its final form such a success, is entitled to protect the advantage that he has gained from this and to earn his reward. These are rights which the court must respect and which it will enforce if it is asked to do so.

9. The second and third declarations which the trial judge made were directed to the exercise of rights, not the granting of discretionary remedies. The majority in the Court of Appeal were, for understandable reasons, reluctant to offer the court's assistance to someone who had delayed for so long in asserting his claim. But it appears that, when they decided to deny him these further declarations which were designed to give effect to the rights that flowed from his co-authorship of the work which was found on unassailable grounds to have been established by the trial judge, they overlooked this fundamental distinction. I agree with my noble and learned friend that, leaving equity on one side as one must, there were no grounds in law for setting these declarations aside."

582. Second, Lord Neuberger, in his speech at [60]-[64], made some important preliminary observations on the defences of laches, estoppel and acquiescence which had been relied upon by the defendants. For present purposes it is sufficient to quote what Lord Neuberger said at [63]-[64]:

"63. Fourthly, in so far as the respondents' argument is put on the basis of estoppel, they would have to establish that it would be in some way unconscionable for Mr Fisher now to insist on his share of the musical copyright in the work being recognised. As Robert Walker LJ said in Gillett v Holt [2001] Ch 210 , 225D, "the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine" of estoppel. Given that their case at each of the three stages is based on the fact that Mr Fisher did not raise his entitlement to such a share, one would expect the respondents to succeed in estoppel only if they could show that they reasonably relied on his having no such claim, that they acted on that reliance, and that it would be unfairly to their detriment if he was now permitted to raise or to enforce such a claim. As was also said in Gillett

[2001] Ch 210 , 232D, the "overwhelming weight of authority shows that detriment is required" although the "requirement must be approached as part of a broad inquiry" into unconscionability.

64. *Fifthly, laches is an equitable doctrine, under which delay can bar a claim to equitable relief. In the Court of Appeal, Mummery LJ said that there was "no requirement of detrimental reliance for the application of acquiescence or laches" - [2008] EWCA Civ 287 , para 85. Although I would not suggest that it is an immutable requirement, some sort of detrimental reliance is usually an essential ingredient of laches, in my opinion. In Lindsay Petroleum Co v Hurd (1874) LR 5 PC 221 , 239, the Lord Chancellor, Lord Selborne, giving the opinion of the Board, said that laches applied where "it would be practically unjust to give a remedy", and that, in every case where a defence "is founded upon mere delay ... the validity of that defence must be tried upon principles substantially equitable." He went on to state that what had to be considered were "the length of the delay and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."*

583. The reasoning of Lord Hope, as quoted above, was indorsed by Lord Neuberger in his speech, at [78]-[79]. Baroness Hale, Lord Walker and Lord Mance agreed with the reasoning of Lord Neuberger.

584. In the present case the Claimants have not sought injunctive relief. They have sought declaratory relief seeking to establish part ownership of the Copyrights and to establish the extent of their rights in the form of the PPRs. They have also sought compensation for infringement of those alleged property rights. The defences to these claims which I am considering, in the context of this issue, do not include proprietary estoppel. In these circumstances it is not easy to see why the Claims, at least so far as the claims for declaratory relief are concerned, do not fall within the scope of the type of claim referred to by Lord Hope in his speech, where a claimant is seeking to exercise their right of property in their own share of a copyright. On this basis defences based on laches or acquiescence or delay are not available in respect of the Claims, at least so far as the claims for declaratory relief are concerned, and, in relation to the claims for financial compensation, at least so far as the Claimants do not seek to invoke the equitable jurisdiction of the court.

585. If however, and to the extent that these defences are available in response to the Claims, it becomes necessary to consider where the balance of justice lies, as referred to by Lord Neuberger in this speech. On the evidence in the present case it seems to me quite clear that the balance of justice would, given the hypotheses which apply to my consideration of this issue, come down firmly in favour of the Claimants. I have set out above, and in the previous section of this judgment, my findings on the conduct of the relevant parties. As I have found, all that the Defendant can point to, on the evidence, is a lengthy period of limited activity or no activity on the part of Mr Redding, Mr Mitchell and their respective successors. In the meantime the Defendant and its predecessors in title have been able to exploit and have exploited the Recordings and the Performances. Although it was argued that the Defendant and its predecessors in title would have acted differently if they had been made aware, at an earlier stage, of the claims based upon the Copyrights and the PPRs there was no evidence sufficient to support these arguments. Nor did it

seem to me that the matters relied upon in this context were capable, even if established on the evidence, of bringing the balance of justice down in favour of the Defendant. I should also add the point, for completeness, that none of the PPRs existed prior to 1996. This necessarily restricts, to a substantial extent, the period of delay which falls to be considered for the purposes of the defences comprised within this issue.

586. In these circumstances, it seems to me that the defences of estoppel by acquiescence and/or laches and/or delay are not available to the Defendant, on the basis of the hypotheses which apply to my consideration of this issue. Those defences are either not available at all, given the property based nature of the Claims or, if they are available, they are not established on the evidence.

587. In this context, and as what I understood to be a free-standing abuse of process defence within this issue, the Defendant also argued that the delay in bringing the Claims constituted an abuse of process because a fair trial of the Claims was not now possible. I was not persuaded by this argument. In my judgment a fair trial of all the issues which I have been asked to determine has not been prevented by the delay in bringing the Claims, and has been possible. While it is true that all of the Band Members and the Producers are now dead, this is not a case where the Defendant has been able to say that, by reason of the death of a particular witness or the loss of some particular document or set of documents, it has been prevented from putting a key part of its case, either on this issue or on any other issue in the Trial. In these circumstances I do not consider that the delay in bringing the Claims renders the Claims an abuse of process, or comes anywhere near the sort of circumstances in which the delay could amount to an abuse of process.

588. In summary, if this issue (or set of issues) had arisen for decision and on the basis of the hypotheses which apply to my consideration of this issue, I would have concluded that the defences based on estoppel by acquiescence and/or laches and/or delay had not been established. Put more simply, I would have concluded that these defences failed. I would also have concluded that the delay did not render the Claims an abuse of process.

Are the Claims improperly constituted, on the basis that the Claimants have failed to join the necessary parties to the action and, if so, can any relief be granted on the Claims?

589. This is a further issue which does not strictly arise for decision, given my earlier conclusions. The issue was however argued before me and I will, as briefly as I can, express my conclusion on this issue. As with the previous two issues, this final issue did not receive that much attention in the oral submissions at the Trial. The submissions on this final issue were, again, largely confined to the written submissions.

590. So far as the Copyright Claim is concerned, the Claimants' pleaded case is that Mr Redding and Mr Mitchell were joint owners of the Copyrights with Jimi Hendrix, on the basis that JHE was a partnership between the Band Members. The Claimants say that each of Mr Redding and Mr Mitchell held a 25% share of the Copyrights. The Claimants sought a declaration to this effect. The Defendant contended that the Copyright Claim was precluded by the failure of the Claimants to join into the Copyright Claim all those with an interest in the Copyrights.

591. Specifically, the missing party was said by the Defendant to be whatever party, on the hypothesis that the Claimants were right in their claim to joint ownership of the

Copyrights, is the successor to the 50% share of the Copyrights originally held by Jimi Hendrix.

592. In this respect, it follows from my earlier analysis that if the Band Members had been the first owners of the Copyrights, Jimi Hendrix's interest in the Copyrights would have passed to the Hendrix Estate, and from there to Experience. On this basis the party which is missing as a defendant to the Copyright Claim, on the hypothesis that the Copyright Claim is a valid claim, is Experience. I note that the Hendrix Companies (Experience and Authentic) are sometimes both referred to in this context as the successors in title to Jimi Hendrix. So far as I can see however, it is only Experience which would have been the actual successor in title to Jimi Hendrix's interest in the Copyrights, if that interest had existed.

593. I have decided that the Band Members were not the first owners of the Copyrights, with the consequence that the Copyright Claim fails at the outset. If however I had decided that the Copyrights were originally vested in the Band Members, I would not have concluded that the Copyright Claim was improperly constituted for the following reasons.

594. The Defendant's argument is based upon CPR 19.3, which provides as follows:

> *"(1) All persons jointly entitled to the remedy claimed by a claimant must be parties unless the court orders otherwise.*
> *(2) If any such person does not agree to be a claimant, he must be made a defendant, unless the court orders otherwise.*
> *(3) This rule does not apply in probate proceedings."*

595. CPR 19.3 was amended by the Civil Procedure (Amendment) Rules 2023 (SI 2023/105), but the amendments are not material for the purposes of the issue I am considering. The commentary on CPR 19.3, at page 540 in Volume 1 of Civil Procedure (The White Book Service 2026) is limited, and does not deal with the scope and application of the rule, or the consequences of non-compliance.

596. The law in this respect, in relation to claims by co-owners of copyrights, is stated in the following terms in Copinger and Skone James, at 4-203 (omitting footnotes):

> *"One co-owner can sue the other co-owners for infringement of copyright for doing any of the acts restricted by the copyright which have been committed without that co-owner's licence. This is because the reference in s.16(2) to acts done without the "licence" of the copyright owner is to be taken as a reference to all the copyright owners. One co-owner therefore has no right to exercise the rights of a copyright owner alone, not even if that person accounts to the other co-owners for a share of any profits: the rights of the other co-owners are not limited to an account.*
>
> *One co-owner can, however, sue third parties for infringement and obtain an injunction and damages without joining the other co-owners. Probably, one tenant in common can only recover damages for the injury done to that tenant in common's share."*

597. This statement of the law was endorsed by Arnold LJ in the Court of Appeal in this case, dismissing the appeal against the refusal of Michael Green J to strike out the Claims. I have already made reference to this judgment, in the context of my consideration of the

issues arising on the Transitional Provisions and in the context of the effect of the Releases and the Discontinuances in relation to the Claims. At [56] in his judgment, Arnold LJ said this:

> *"56. It is well established that each owner of a copyright can sue for infringement without joining the other owners: see Copinger and Skone James on Copyright (19th ed) at 4-203 and the authorities cited. It is doubtful whether this long-standing substantive rule of copyright law can have been changed by CPR rule 19.3. In any event, the judge (despite not having been referred to the relevant authorities) declined to strike out the claim for non-compliance with rule 19.3 due to the Claimants' failure to join any party said to own Hendrix's share of the copyrights, and Sony has not appealed that part of his decision."*

598. As Arnold LJ pointed out, at first instance Michael Green J had declined to strike out the Copyright Claim on the basis on non-compliance with CPR 19.3. There was no appeal to the Court of Appeal against that part of the decision of Michael Green J on the strike out application. It is in fact instructive to consider the reasons given by Michael Green J, in his judgment at [29]-[39], for refusing to strike out the Copyright Claim on this ground. It is not necessary to quote the whole of this extract, but I note in particular what Michael Green J had to say at [37] and [38]:

> *"37. Mr Howe KC submitted that strike out is justified because the Claimants have deliberately decided not to join Experience and/or Authentic, despite knowing that those companies have been asserting their rights over the Recordings for over 50 years. If the Claimants are truly maintaining that those companies are not the joint owners, they must identify who they say the joint owners are and join them to the proceedings. Mr Howe KC submitted that the court should not make a declaration as to the ownership of the copyright in the Recordings without all the potential joint owners being before the court and so bound by the declaration.*
>
> *38. However, I do not believe the position is so dramatic. The court clearly has a discretion under CPR 19.3 and I think it is appropriate to see if Experience and/or Authentic wish to be joined to these proceedings. If they do so wish, that can easily be done. If they do not, and the Claimants are ultimately successful in establishing their joint ownership of the copyright, then that declaration can be used for the purpose of pursuing Sony for infringement of their shared interest in the copyright. Sony is able to defend the claim by providing evidence or running legal arguments that the Claimants do not have any interest in the copyright of the Recordings. I do not think that it causes Sony any prejudice that the other alleged joint owners of the copyright have not been joined to these proceedings."*

599. In their skeleton argument for the Trial the Defendant's counsel sought to rely upon *Roche v Sherrington* [1982] 1 WLR 599, as an example of a case which demonstrates that an action is improperly constituted in circumstances where all the people said to be jointly interested in a claim are not joined in the proceedings. This argument has however already been dealt with by Michael Green J in his judgment, at [33] and [34]. Since I agree with Michael Green J's analysis of the distinction between the present case and authorities such as *Roche v Sherrington*, and since I cannot improve upon that analysis, I take the liberty of quoting [33] and [34]:

> *"33. It seems to me that the rule is directed at protecting defendants from being subject to subsequent claims for the same relief. In Roche, the plaintiff was jointly entitled to the repayment of a loan with two other persons, as the monies that were paid in respect of the loan came out of an account that was in the joint names of those three persons. Slade J did not strike out the proceedings, but stayed them, so that the plaintiff could establish the position of the other two persons and see whether they were claiming any interest in the loaned money or whether they disavowed any such interest. The plaintiff was maintaining that he was the sole beneficial owner of the moneys loaned to the defendant. Slade J was concerned that, the position was not clarified, and they were not joined to the proceedings, the defendant may remain "exposed to future claims at their suit".*
>
> *34. In this case Sony is not at risk of a claim by Experience and/or Authentic as to their ownership of the copyright in the Recordings. Indeed, Sony derives its title to exploit the Recordings from Experience's and/or Authentic's purported ownership of the copyright. Furthermore, Experience and Authentic, together with SME, began the proceedings in New York against the Claimants asserting their ownership of all the rights in the Recordings. They are effectively on the same side and I do not see that they are prejudiced by not being parties to this claim. Having said that, if they wish to be joined, I do not imagine that there would be any objection to this."*

600. The Defendant's counsel also argued that the statement of the law in Copinger could be distinguished on the basis that, in the present case, the Claimants were seeking to establish that they were joint owners of the Copyrights with a third party. It was impossible for the court to rule upon that case, so it was contended, unless the third party was joined into the Claims. What the Claimants had done, so it was submitted, was the equivalent of suing the sub-tenant of one room in a house for trespass, as a device to try to obtain a declaration as to their alleged ownership of the house, without either first suing the owner of the house to establish their interest in the house or joining the owner of the house to the action against the sub-tenant. The point was stressed that the terms of CPR 19.3 are compulsory, and that the Claimants should be not permitted to claim declaratory relief in respect of their alleged ownership of the Copyrights in circumstances where they had made a deliberate choice not to include the Hendrix Companies in the Claims.

601. I was not persuaded by these and associated arguments advanced by the Defendant in relation to CPR 19.3; essentially for four reasons.

602. First, while it may be said that there is no actual issue estoppel between the parties, in terms of what was said by Michael Green J and Arnold LJ in relation to CPR 19.3, I can see no good reason for not following the views which they expressed on the question of whether Experience or the Hendrix Companies needed to be joined into the Claims. I respectfully agree with the analysis of Michael Green J in his judgment on the strike out application at [29]-[39], from which I have quoted above, as endorsed by the Court of Appeal.

603. Second, it is clear from the commentary in Copinger that it is well-established that one copyright co-owner can sue a third party infringer without joining other copyright owners. It is true that the statement of the law in Copinger is expressed by reference to

claims for an injunction and damages, on the basis that the co-owner can only sue in respect of injury done to that co-owner's share of the copyright. In the present case there is the claim for a declaration as to the ownership of the Copyrights, in addition to the claim for damages for infringement of the Claimants' alleged interests in the Copyrights. In these circumstances, it might be said that there is something in the Defendant's argument that the dispute over the ownership of the Copyrights required the involvement of all those alleged to have an interest in the Copyrights.

604. On the facts of the present case however, I do not see that this problem arises. The practical reality is that the parties have, in the present case and in the absence of Experience, had no difficulty in conducting their dispute over the original ownership of the Copyrights, in order to determine whether Mr Redding and Mr Mitchell were co-owners of the Copyrights. If the Claimants had been successful in establishing that Mr Redding and Mr Mitchell were co-owners, it would have been on the basis that they were first owners of the Copyrights with Jimi Hendrix. This would have been sufficient to establish the Claimants' co-ownership of the Copyrights, as the respective successors in title of Mr Redding and Mr Mitchell. I do not see why it would not have been open to me to make a declaration to this effect, notwithstanding the absence of Experience from the Claims, as successor in title to what would have been, on the hypothesis that the Band Members were first owners of the Copyrights, Jimi Hendrix's share of the Copyrights.

605. In these circumstances I am not persuaded that the present case lies outside the scope of the statement of the law in Copinger. Nor am I persuaded that the claim for declaratory relief in relation to the ownership of the Copyrights is correctly classified as a claim for a joint remedy with whoever would be the successor in title to the Hendrix Estate, on the hypothesis that the Band Members were first owners of the Copyrights. The same applies, on the same hypothesis, to the claims for infringement of the Copyrights consequential upon the claim to part ownership of the Copyrights. Indeed, the analysis above demonstrates how far removed the circumstances of the present case are from the sub-tenant/house analogy relied upon by the Defendant's counsel.

606. Third, and this may be said to be a part of my second reason, the Defendant's argument seems to me to beg the question of what kind of declaratory relief would have fallen to be granted in the present case, if the Claimants had been successful in establishing that Mr Redding and Mr Mitchell were first owners of the Copyrights with Jimi Hendrix. A declaration could perfectly well have been made to the effect that the Band Members were the first owners of the Copyrights and to the effect that the shares of the ownership of the Copyrights held by Mr Redding and Mr Mitchell had devolved to the Claimants, as the basis for the grant of further relief for infringement of the Claimants' part ownership of the Copyrights. Declarations of this kind could have been made without, as it seems to me, having to engage the question of the identity of the person or persons who would now, on the hypothesis that the Band Members were first owners of the Copyrights, be entitled to the share of the Copyrights originally owned by Jimi Hendrix. The same reasoning applies to the further claims for relief made by the Claimants in the Copyright Claim.

607. Fourth, there is an additional practical reality in this case. It is notable that neither party to the Claims has made an application to join Experience into the Claims. Nor has Experience applied to have itself joined into the Claims as an additional defendant. This cannot be as a consequence of ignorance of the Claims on the part of Experience. The

Hendrix Companies (Experience and Authentic) and SME have brought the proceedings in New York against the Claimants, which are currently stayed. In circumstances where neither party to the Claims nor Experience has shown any interest in Experience being joined into the Claims, it is difficult to accept an argument that the Claims are improperly constituted. Returning to the sub-tenant/house analogy relied upon by the Defendant's counsel, the equivalent situation, in this respect, would be one where the owner of the house, despite knowing of the proceedings against the sub-tenant and the claim to ownership of the house, declined to take any part in the proceedings.

608. The grant of declaratory relief is a discretionary remedy but, in circumstances where I am not persuaded that the Copyright Claim was improperly constituted, I can see no basis on which it would have been appropriate to refuse the grant of declaratory relief to the Claimants, if they had succeeded in establishing that the Band Members were the first owners of the Copyrights.

609. Finally, and for the sake of completeness, I should make brief reference to the PPR Claim. I have decided that it is not open to the Claimants to pursue the PPR Claim, for the reasons which I have given earlier in this judgment. If the Claimants were able to pursue the PPR Claim, as successors in title of Mr Redding and Mr Mitchell, each of the Claimants would have had a separate claim in respect of the PPRs previously held, respectively, by Mr Redding and Mr Mitchell. Putting the matter more simply, if each Claimant is assumed to have a claim in respect of the PPRs, the claim is not a joint claim but an individual claim based on the performers' property rights which were vested separately in, respectively, Mr Redding and Mr Mitchell. As such, CPR 19.3 is not engaged in relation to the PPR Claim. I did not understand the Defendant to argue to the contrary.

610. Drawing together all of the above analysis, I conclude that the Claims were not improperly constituted on the basis of a failure to join a necessary party into the Claims or either of them. As such, and if the Claimants had established the validity of the Claims, the absence of joinder of whatever party was, on the Claimants' case, entitled to a 50% share of the Copyrights as successor in title to the Hendrix Estate would not have prevented the grant of relief.

<u>The outcome of the Trial</u>

611. For the reasons set out in this judgment the Claims fail. In summary:
    (1) The Claims fail on the basis of my analysis of the Recording Agreement.
    (2) The Claims also fail on the basis that they are precluded by the Releases.
    (3) The Claims also fail on the basis that they are precluded by the Discontinuances.

612. Accordingly, the Claims fall to be dismissed.

613. I will hear counsel further, as necessary, on all matters consequential upon this judgment. In the usual way the parties are encouraged to agree, subject to my approval, as much as they can in relation to the order to be made consequential upon the dismissal of the Claims.

ANNEX

Outline of the structure and hierarchy of the courts of New York and the federal courts of the United States

1. There are two parallel court systems in the United States; state courts and federal courts:
   (1) State courts decide questions of state law, such as the traditional common law areas of contract, tort, property, and restitution; criminal, family, and probate law; and all other matters arising under the state's legislation and constitution. Federal courts decide questions of federal law, including all matters arising under federal statutes and the U.S. Constitution. In many (but not all) cases, state courts also have jurisdiction to decide federal law questions and federal courts have jurisdiction to decide state law questions.
   (2) The U.S. Supreme Court (the highest federal court) is the final arbiter of federal law (constitutional and statutory), and each state's highest court is the final arbiter of its state law. In the case of New York, the Court of Appeals in New York is the final arbiter of the meaning of the law of New York.

2. In terms of New York the basic structure is a system of trial courts. Above these trial courts sit appeal courts, termed Appellate Divisions of the Supreme Court and Appellate Terms of the Supreme Court. The highest state court in New York is the Court of Appeals:
   (1) New York has eleven different types of trial court. These trial courts include the Supreme Court, in which many of the cases to which I have been referred were decided. The Supreme Court has justices sitting in all 62 counties of New York.
   (2) Another of these trial courts is the Surrogate's Court, which sits in each county of New York. It will be recalled that what I have referred to as the Administration Proceedings, in relation to the Hendrix Estate, were brought in the Surrogate's Court. The objection made by Mr Redding and Mr Mitchell to the petition for voluntary accounting in the Administration Proceedings, which I am referring to as the Accounting Claim, was thus located in the Surrogate's Court.
   (3) The Appellate Divisions are divided into four Departments (the First, Second, Third, and Fourth Departments). There are also the two Appellate Terms (the First and Second Departments), which function as intermediate appeal courts.
   (4) The Appellate Divisions tend to address commercial matters. The four Departments of the Appellate Division hear cases from the four geographic regions from which those cases originate. Each Department's decisions are binding on all trial courts in the state, regardless of whether those courts are in that Department's particular geographic region.
   (5) As mentioned above, the New York Court of Appeals is the ultimate arbiter of New York state law issues. The interpretation of New York law by the Court of Appeals is binding on all courts, in both the New York and federal systems. The U.S. Supreme Court cannot overrule the New York Court of Appeals on matters of New York state law.
   (6) New York Appellate Division opinions are binding on all state courts in New York (except the Court of Appeals), unless there is a split, in respect of which lower courts must follow their geographical Appellate Division.
   (7) The opinions of the New York Appellate Division concerning New York law bind federal courts as well, including federal District Courts in the four New York

districts and the Second Circuit Court of Appeals, unless the federal courts determine that the New York Court of Appeals would rule differently.

(8) New York trial courts, including the New York Supreme Court, are not bound by federal decisions concerning New York law, but federal decisions are persuasive authority in New York.

3. In relation to federal courts the structure, in outline, is as follows:

(1) The federal system is divided into twelve geographic regions called circuits, which are further subdivided into 94 judicial districts (at least one for each of the 50 states plus the District of Columbia).

(2) Each of the 94 federal districts has a District Court, which serves as the primary trial court for cases entering the federal system.

(3) New York has four federal districts: the Northern, Southern, Eastern, and Western Districts of New York. The Southern and Eastern Districts include portions of New York City, and the Southern District includes Manhattan.

(4) Intermediate federal appeal courts are called U.S. Courts of Appeals or Circuit Courts. There is one for each of the twelve regional circuits, and a thirteenth, the U.S. Court of Appeals for the Federal Circuit, which addresses specialized issues such as patent law, and also hears appeals from certain specialized courts.

(5) The Second Circuit includes all of the New York State federal judicial districts, and the Second Circuit Court of Appeals hears appeals from all of the federal District Courts in New York.

(6) Federal Courts of Appeals (i.e., Circuit Courts) are staffed by Circuit Judges.

(7) The decisions of Circuit Courts are binding on the District Courts in that Circuit. They are persuasive authority to District and Circuit Courts in other circuits.

(8) U.S. Supreme Court decisions are binding authority on all federal statutory and constitutional issues.